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**M. R. Westropp.**







NEW  
REPORTS  
OF  
Cases  
HEARD IN  
THE HOUSE OF LORDS,  
ON  
APPEALS AND WRITS OF ERROR;  
AND DECIDED  
DURING THE SESSION  
1829.

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By RICHARD BLIGH, Esq.

BARRISTER AT LAW.

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VOL. III.

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(SUCCESSORS TO JOSEPH BUTTERWORTH AND SON,)  
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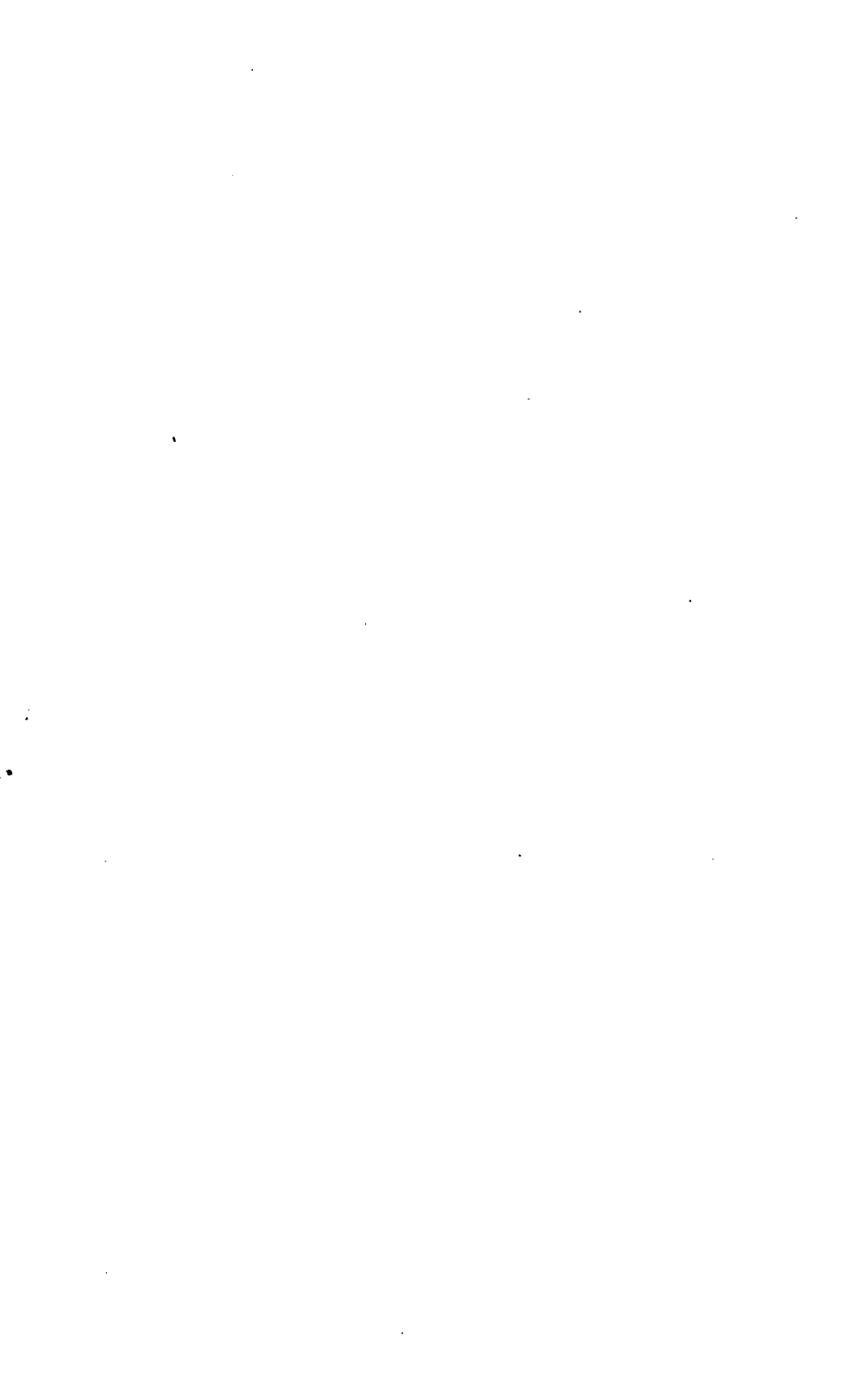
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# REPORTS OF CASES

1829.

  
BALL  
&  
MANNIN.

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

*And decided during the Session 1829,*

10th GEO. IV.

---

IRELAND.

(EXCHEQUER CHAMBER.)

RICHARD BALL, a Minor, }  
by HENRY WEMYSS, his } *Plaintiff in Error.*  
Uncle and next Friend }

PATRICK MANNIN, Lessee }  
of LAUNCELOT SHINTON } *Defendant in Error.*  
BALL - - - }

By a deed in 1762, lands were conveyed to the use of the grantor for life, and after his death in trust for D. S. his daughter, the wife of R. S.; and after her death, to the first and other sons successively of D. S. by R. S., with remainders over, and subject to a power of revocation. In 1763 the grantor, by a will made in execution of the power, directed and desired that if there should be no issue male of the existing marriage, the lands should stand limited (subject to the dispositions of the deed of 1762) to the first and other sons of his daughter, by any other husband.

R. S. died in 1778, leaving D. S., his widow, and four sons surviving. Soon after his death, D. S. married R. B., by whom she had a son A. B.

J. S. the eldest son of the first marriage, having been from his infancy a person of weak capacity, in the year 1785, as soon as he came of age, joined with his mother and father-in-law,

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as party to a deed, by which reciting his title as tenant in tail in remainder, subject to his mother's life interest in the lands, and an agreement which had been made for providing thereout, a present maintenance for him; and that the younger children of his mother had been left without provision by the deed of 1762; and further reciting certain expenditure made on the premises by R. B. the husband of his mother, for the benefit of the inheritance, the lands were assigned to trustees for a term of five hundred years, in trust to secure to J. S. an annuity of £ , and subject thereto to the use of the mother for life; remainder to R. B. for his life, remainder to trustees for a term, to raise portions for the younger children of D. M. his mother, and subject thereto to the use of J. S. and the heirs male of his body, and in default of male issue to such other of the children of D. M. as she should appoint, and in default of appointment, to R. S., E. S., and A. B., three of her children; remainder to her right heirs.

A fine and recovery were levied to give effect to this deed, which was registered in 1789.

J. S. died in 1794. In 1800, L. S., the second son of the first marriage, filed a bill in Chancery against R. B. and D. his wife, to establish the deed of 1762, and to set aside the deed of 1785 on the ground of fraud. This bill was dismissed by the plaintiff in 1806.

By deed in 1803, D. the mother, appointed the lands to A. B. her youngest son, subject to the payment of annuities. In 1809 the lands were, by deed executed on the marriage of A. B., settled on the husband and wife, and the issue of the marriage, notwithstanding notice given to the parties by L. S. of his claim.

R. B. died in 1813. A. B. died in 1814, leaving a son. D. the mother died in 1818. Upon this event, L. S. brought an ejectment against the parties in possession under the deed of 1785. This ejectment was not prosecuted, but in 1821 L. S. being dead, an ejectment was brought against the same parties by his son. Upon the trial it was agreed between the parties, that the sole question should be, whether the deed of 1785 was void at law as the deed of J. S. It was sworn upon the trial by some witnesses, that J. S. was not competent at the time of executing the deed, and they spoke to acts and conduct evidencing mental incapacity. On the other hand, it was by others sworn, that he was competent to execute. It was admitted that the incapacity did not arise from lunacy,—no evidence having been given of lunacy.

The Judge, in his charge to the jury, told them that the question for them to try was, whether J. S. was a person of sound mind or not, and that to constitute such unsoundness of mind as should avoid a deed at law? the person executing such a deed, must be incapable of understanding and acting in the ordinary affairs of life, that it was not necessary that he should be without any glimmering of reason, and that as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him. To this direction a bill of exceptions was taken, upon the ground that the Judge refused to tell the jury that in order to avoid the deed at law, the unsoundness of mind must amount to that which constitutes idiocy according to the strict legal definition of an idiot.

Held that this direction was right, and that the case could not be argued or decided upon an objection that the direction was too general and vague, because such objection was not taken at the trial, and did not form part of the bill of exceptions,

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**I**N the year 1762, John Ball was seised in fee of the town and lands of Bannaghnooh, otherwise Three Castles, Neaglesland, Boards, and Pricksheath and Monafrika, lying in the parish of Bannaghnooh, otherwise Three Castles, in the barony of Cranagh and county of Kilkennny.

Dorothea Margaret Ball, his only child, intermarried privately with Richard Shinton.

For the purpose of making a provision for Dorothea Margaret and her issue, independently of her husband, John Ball executed an indenture of release upon the 10th of July, 1762, by which he granted, released, and confirmed the said town and lands to certain trustees, in trust to the use of himself for life, remainder to his daughter Dorothea Margaret for life, remainder to her heirs in



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tail male, with divers remainders over, reserving a power to alter these limitations by deed or will.

On the 6th of March, 1763, John Ball, by his will, after charging the town and lands with an annuity of 100*l.* per annum to his wife during her life, devised and directed as follows: “ And I  
“ hereby devise, and direct and declare, that the  
“ said trustees mentioned in the said deed of the  
“ 10th of July, 1762, shall as far as the law can  
“ permit, be deemed and taken to stand seised of  
“ my estate vested in them or granted to them, in  
“ the first place, to the uses of this my will; and  
“ that they do every act in their power to esta-  
“ blish and fulfil the same; and my further will  
“ is, that as there are now seven years of a lease  
“ of the house and gardens and seventy acres of  
“ land to come, commencing from the 25th of  
“ March, 1763, to Folliot Warren, Esq. that at  
“ the expiration of the said lease my daughter  
“ Dorothea Margaret Shinton may live in said  
“ house, and may have said number of acres  
“ during her life, but not her husband or any one  
“ of their family after her decease; but to be set  
“ by my said trustees after her decease, to the  
“ best improved rent for the benefit of her chil-  
“ dren, nor shall the said Shinton have any power  
“ during said Dorothea Margaret’s life to turn,  
“ plough, or cut down any oak, ash, elm, hazle,  
“ or apple trees or hedges whatsoever, or on any  
“ account, and to keep up the improvements for  
“ the benefit of her children.” By this will the testator also made a large provision for the younger children of his daughter.

John Ball died soon after executing this will.

In the year 1778, Richard Shinton, the husband

of Dorothea Margaret, died, leaving issue, John, their eldest son, who was from his infancy weak in mind; Lancelot, their second son, the father of the Defendant in error; Richard, their third son; George, their fourth son, and an only daughter, Dorothea. All these children took the name of Ball.

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Soon after the death of Richard Shinton, Dorothea Margaret intermarried with Richard Ball, for many years a practising attorney, by whom she had an only son Abraham, who was the father of the Plaintiff in error.

By deed, dated October 17, 1785, and executed by and between Richard Ball and Dorothea Margaret, his wife, of the first part, John Shinton Ball of the second part, the Reverend Wardlow Ball, clerk, and Serjeant John Ball of the third part, John Humphrey of the fourth part, and Samuel Foley of the fifth and last part, reciting the title of Dorothea Margaret and John Shinton Ball to the said estate, and an agreement entered into for providing a present maintenance for him thereout, and that the younger children of Dorothea Margaret had been left wholly without any provision by the former deed; and further reciting the expenditure made by Richard Ball on the house and demesne, for the benefit of the inheritance, Richard Ball and Dorothea Margaret, his wife, and John Shinton Ball, joined in assigning the said lands and estate to Wardlow and John Ball, to the use of John Humphrey, for a term of three hundred years, in trust to secure the maintenance and present provision for John Shinton Ball, payable quarterly, and subject thereto to the use of Dorothea Margaret, without impeachment of waste, for her life, with remainder to Richard Ball for

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his life, in like manner with remainder to Samuel Foley for a term of five hundred years, in trust to raise the portions so agreed to be provided for the younger children of Dorothea Margaret, and subject thereto to the use of John Shinton Ball, and the heirs male of his body; and in default of such issue, to the use of such other of her children, and for such estates therein, as Dorothea Margaret should by deed or writing, under her hand and seal, and attested by two or more credible witnesses, or by her last will, direct and appoint; and in default of such direction and appointment, to the use of Richard Shinton, George Shinton, and Abraham Ball, three of her children, share and share alike as tenants in common in tail general; and for default of such issue, with remainder to the right heirs of Dorothea Margaret for ever: And the deed, after reciting that a fine with proclamation had been levied in the preceding Trinity term, of the lands, by Richard and Dorothea Margaret Ball, and John Shinton Ball, to Wardlow Ball, directed that the fine should enure to make him a perfect tenant to the precipe of the lands, that a common recovery might be suffered thereof by the said parties, in order to bar all estates tail and remainders therein, and to enure to the uses declared by the said deed, and reserved a joint power of revocation of the said uses and trusts, and of new appointment of others in their stead, to Richard and Dorothea and John Shinton Ball, during the lives of Richard and Dorothea; and to John Shinton Ball, and the survivor of Richard and Dorothea Margaret, during the life of such survivor. This deed was registered on the 21st day of October, 1789.

The recovery was suffered by John Shinton Ball as of Michaelmas term, 1785, by virtue of a warrant of attorney duly executed by him for the purpose, in which recovery Thomas Ball was demandant, and Wardlow Ball was tenant to the precipe, who appeared and vouched John Shinton Ball, who appeared by his attorney and vouched the common vouchee.

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John Shinton Ball died in the year 1794, and his brother Launcelot Shinton Ball exhibited his bill in the Court of Chancery in Ireland upon the 24th of December, 1800, against Richard Ball and Dorothea his wife, stating the settlement and will of John Ball, the imbecility of John Shinton Ball, and that fraud was practised upon him, and praying that Richard and Dorothea might bring into Court the deed of 10th July, 1762, and that the trusts thereof might be performed, and that the fraudulent deed might be set aside, and that the fine and recovery might enure to the uses of the deed of 1762.

This bill was afterwards dismissed at the instance of the Plaintiff.

By deed dated May 14, 1803, Dorothea Margaret Ball, in pursuance and execution of the power reserved to her by the deed of the 17th of October, 1785, limited and appointed the lands, after her own and her husband's death, and subject to the trust terms thereby created, to the use of her youngest son Abraham Ball and his heirs, subject however to and charged with an annuity of 40*l.* yearly to Richard Shinton, her third son by her first husband, for his life; and a further annuity of 30*l.* yearly to her daughter, Dorothea Shinton, for her life, payable thereout.

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Abraham Ball afterwards intermarried with Jane Wemys, in consideration of which marriage, a settlement, dated April 4, 1809, was executed by and between Richard Ball and Dorothea Margaret, his wife, of the first part, Abraham Ball of the second part, James Wemys, and Jane his daughter, of the third part, and the said James Wemys, Sir John Blunden, Bart. and the Rev. Sterne Ball, clerk, of the fourth and last part, whereby the said lands and premises were settled and limited to the uses of the said marriage, viz. to provide a present maintenance for Abraham Ball, and a jointure for his intended wife, and subject thereto after the decease of the said Dorothea Margaret and Richard Ball, to Abraham Ball for his life, and after his death, to the use of the issue of the said marriage, subject to his appointment by deed or will as therein mentioned.

The marriage afterwards took effect, and there was issue born thereof, Richard Ball, the Plaintiff in error, and two daughters, Martha and Dorothea.

Richard Ball died in 1813, leaving his wife, Dorothea Margaret, surviving him.

Abraham Ball died in 1814, leaving his three children surviving him, and without having exercised the power of appointment given him by the deed of the 4th of April, 1809.

Dorothea Margaret Ball died in 1818; upon her death, Richard Ball, the Plaintiff in error, and his sisters, took possession of the estate.

Immediately after the death of Dorothea Margaret, Lancelot Shinton, her second son, the father of the Defendant in error, as of Michaelmas term 1818, brought an ejectment in the Court of Exchequer to recover the possession of the lands

and laid demises therein in his own name, and in the names of several other persons, in whom the legal estate in the premises might be considered to be outstanding; defence was taken to this ejectment for all the premises therein in the names of the Plaintiff in error and his sisters, and the cause being at issue, a consent was entered into between the parties therein, limiting the issue to be tried between them to the sole question of the competence of John Shinton Ball to execute the deed of the 17th October, 1785.

The issue in the cause came on to be tried before a special jury of the County of Kilkenny, at the summer assizes 1819, when after the Plaintiff had gone through his case, and three witnesses having been examined for the Defendant, a compromise was proposed and agreed to on both sides, and made a rule of the Court, and the jury was discharged by consent without giving any verdict.

Lancelot Shinton having subsequently refused to abide by the compromise, and to fulfil its terms, and having proceeded to bring another ejectment to recover possession of the lands in the Court of King's Bench, and obtained judgment by default therein, a conditional order was obtained from the Court of Exchequer for an attachment against him for his contempt of the Court in so proceeding under the circumstances, unless he should forthwith vacate the judgment.

Lancelot Shinton, during the proceedings, was in so infirm a state of health that the order could not be served upon him in person, and in February 1821 he died without having been served therewith, leaving the Defendant in error his eldest son and heir at law, who immediately thereupon as of

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“ sworn and examined deposed, that in their opinion the said John Shinton Ball at the said time was competent to execute the said deed, and further deposed to acts and conduct of the said John Shinton Ball as evidencing his mental capacity, and deposed that the said John Shinton Ball was certainly not an idiot ; and thereupon the case and evidence having been closed on both sides, and it having been admitted and agreed by the counsel for each of the parties, that the alleged incapacity of mind of the said John Shinton Ball did not arise from lunacy, no evidence having been given of lunacy in him, the learned Judge in his charge commented and observed upon the evidence given on each side, and told the jury, that the question for them to try was, whether the said John Shinton Ball was a person of sound mind or not ; and that to constitute such unsoundness of mind, as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life ; that it was not necessary that he should be without any glimmering of reason, but that it was sufficient if he was incapable of understanding his own ordinary concerns, and that as one test of such incapacity, the jury were at liberty to consider, whether he was capable of understanding what he did by executing the deed in question when its general purport was fully explained to him ; whereupon the counsel for the Defendant in the action called on the learned Judge, and required him to tell and direct the jury, that in order to avoid said deed at law, the unsoundness of mind of the said John Shinton

“ Ball must amount to that degree of unsoundness  
 “ which constituted idiocy according to the strict  
 “ legal definition of an idiot. But the learned  
 “ Judge refused so to tell or direct the said jury on  
 “ the said trial, but, on the contrary, directed  
 “ them as before stated; wherefore the counsel  
 “ for the said Defendant on his behalf excepted  
 “ to the said opinion and direction of the learned  
 “ Judge on the said trial;” and, at the request of the  
 counsel for the Plaintiff in error, the learned Judge  
 who presided at the trial put his seal to a bill of ex-  
 ceptions to the above effect, tendered by them.

The matter having been argued upon the ex-  
 ceptions before the Court of King’s Bench in  
 Ireland, that Court, on the 8th February, 1825,  
 overruled the exceptions, and judgment was  
 thereupon entered for the Defendant in error.

The Plaintiff in error being dissatisfied with  
 this judgment of the Court of King’s Bench,  
 brought his writ of error returnable in the Ex-  
 chequer Chamber in Ireland, insisting “ that in  
 “ the record and proceedings aforesaid, and also  
 “ in the matter recited and contained in the bill  
 “ of exceptions, and also in giving the judgment  
 “ aforesaid, there is manifest error in this, to  
 “ wit, that the Honourable Mr. Justice Jebb,  
 “ the learned judge before whom, and so forth,  
 “ at and upon the trial of the issue so joined  
 “ between the parties aforesaid, did direct and  
 “ tell the jury so impanelled to try the issue,  
 “ that the question for them to try was, Whether  
 “ the said John Shinton Ball was a person of  
 “ sound mind or not, and that, to constitute such  
 “ unsoundness of mind as should avoid a deed  
 “ at law, the person executing such deed must

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“ be incapable of understanding and acting in  
“ the ordinary affairs of life. That it was not  
“ necessary that he should be without any glim-  
“ mering of reason, but that it was sufficient if  
“ he was incapable of understanding his own  
“ ordinary concerns; and that as one test of  
“ such incapacity, the said jury were at liberty  
“ to consider whether he was capable of under-  
“ standing what he did by making the deed in  
“ question, when its general purport was gene-  
“ rally explained to him: And there is also  
“ error in this, to wit, that the learned Judge,  
“ upon the trial of the issue, did refuse to tell  
“ and direct the said jury, though called upon  
“ so to do by counsel for the said Richard Ball,  
“ that in order to avoid the deed so executed by  
“ the said John Shinton Ball at law, the un-  
“ soundness of mind of the said John Shinton  
“ Ball must amount to that degree of unsound-  
“ ness of mind which constituted idiocy, accord-  
“ ing to the strict legal definition of an idiot.  
“ And there is also error in this, to wit, that by  
“ the record aforesaid it appears that the verdict  
“ aforesaid was given upon the issue for the said  
“ Patrick Mannin, whereas the verdict, by the  
“ law of the land as to the issue, ought to have  
“ been given for the said Richard Ball,” &c.

The case was argued before the Court of Ex-  
chequer Chamber in Ireland, upon the 15th day  
of June, 1826, when the Judges gave their  
opinions *seriatim*, six of them being of opinion  
that the judgment should, and the remaining six  
that it should not be reversed; whereupon, ac-  
cording to the practice of the Court, the judgment  
remained undisturbed and was affirmed. Richard

Ball then brought his writ of error returnable in Parliament, and assigned for errors the several matters on which he insisted before the Court of Exchequer Chamber in Ireland, to which the said Patrick Mannin rejoined that there was no error.

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For the Plaintiff in Error—*Mr. Sugden and Mr. Swan.*

There are only four kinds of insanity known to the law, lunacy, idiocy, accidental loss and wilful deprivation of understanding.\* This case does not fall within the two last divisions, and lunacy being excluded by agreement, the question is confined to idiocy. In the cases of drunkenness and blindness, and where the question is as to the degree of understanding, the courts proceed on the ground of fraud, which is a good objection at law as well as in equity. There are cases peculiar to equity, which proceed on equitable grounds.† The judgment in this case seems to have proceeded on the principles applied in commissions of lunacy and in courts of equity, which is a different species of jurisdiction; and even in those cases the jury must find that the person is of unsound mind,—it is not sufficient to find that he is of weak judgment and understanding, and incapable to manage his affairs, and formerly commissions were not granted upon this ground.‡

\* Co. Litt. 248, a. *Beverley's Case*, 4 Co. 124.

† *Osmond v. Fitzroy*. Citing *Johnson v. Medlicot*. 3, P. W., 130.

‡ *Exp. Barnsley*, 3 Atk. 168. *Lord Donegal's case*, 2 Ves. 407. See *Ridgway v. Darwin*, 8 Ves. 65.

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Where courts of equity make deeds void on the ground of weakness of understanding, it is in cases where there is inadequacy of price, or undue influence, by parental authority or otherwise; and even in such cases effect is given to such deeds, so far as they are providently executed.\*

If insanity were the only ground, the case would be sent to a court of law. If weakness of understanding is the ground of proceeding, it is only one among other ingredients which in equity constitute fraud. To direct a jury to consider whether a man is capable of understanding a deed is a dangerous practice, and contrary to the practice on commissions of lunacy.

In *exp. Holmes*† the jury found that the party was “not competent,” and the proceeding was quashed because the return was deemed insufficient. In *exp. Cranmer*‡ the return was, that “he was so far debilitated in his mind as to be “incapable of the general management of his “affairs.” This return was quashed for insufficiency: so a return in the words of the Judge’s direction to the jury in this case would have been quashed. If the finding is not in the words of the commission, it must be in words of known legal import, that the party is of unsound mind. In *Ridgway v. Darwin*,§ Lord Eldon ordered physicians to visit a lady whom a jury had found not to be a lunatic, for the purpose of determining whether her state of mind was competent to the

\* *Bennet v. Vade*, 2 Atk. 324.

† Before L. C. Lyndhurst, 23d Nov. 1827; a new commission issued on the 26th November, under which the party was found of unsound mind.

‡ 12 Ves. q. 445.

§ 8 Ves. 65. See *Sherwood v. Sanderson*, 19 Ves. 280.

management of her affairs, with a view to personal control without a commission, and he said that, although it was not a case of insanity, he thought himself bound to do this, if it was only made out that it was not fit that she should have the management of her pecuniary affairs. But this is language unfit to be addressed to a jury, and the doctrine cannot be applied at law. The cases of supposed partial insanity\* are in fact total;—the proof only is partial. At law the only question is, whether the party is of unsound mind. Before the Lord Chancellor the question may be, where insanity is not proved, whether the protection of the Court is not necessary for the individual. There is a case now before the Lord Chancellor, where the party has lost his faculties by age.† The case of *Faulder‡ v. Silk* is no authority for the Defendant, it is an authority for the Plaintiff. There the fact of lunacy was established prior to the execution of the bond, and the only question was, whether it was executed during a lucid interval. In this case the question of lunacy is excluded. The direction of the Judge was wrong, because it was not confined to idiocy, and because it induced the jury to look to the whole life of the party who executed the deed, not precisely to the particular time of execution.

In the case of wills, the question turns upon general capacity, and wills have been found void

\* *Dew v. Clarke. Addams' Ecc. Rep.* 3. 79. *Haggard's Judgm. of Sir J. Nichol* before the Delegates, 1828. Before the L. C. on application for a commission of review, 1829, not rep<sup>d</sup>. *Exp. Mitchell* heard before the Lord Chancellor in private.

† *Exp. Clement*, still pending.

‡ 3 *Camp.* 126, more full 1 *Coll. Lun.* 390.

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where the testator would not have been found insane if living. The question as to deeds stands on different principles. That is a question between parties dealing for consideration, whereas in wills it is between representatives and voluntary donees.

The charge of the Judge is vague, uncertain, and calculated to mislead the jury. If the jury were satisfied that the party was capable at the time of executing the deed, they were not at liberty to enter into the question whether he was capable of acting in the ordinary affairs of life. The jury should have been directed to inquire, whether he understood the act, and to go no farther. They were directed to try a question not before them. His general conduct was not a question at issue. He might have been prodigal, and apparently incapable of acting in ordinary affairs, yet not insane, and incapable of understanding and executing the deed in question. The great objection to the Judge's direction is, that the capacity to do the act is not put as the real criterion and distinct matter in issue, but only as one test to shew the soundness of his mind as to all the acts of his life. So that upon a question of purchase, no man could act safely without inquiring as to the whole conduct in a vendor's life. The question upon a direction to a jury, and the influence which it may have, is very different from the opinion of a judge, on a point of law. The direction is wrong both in what is directed and what is omitted.

For the Defendants in error.—*The Solicitor General* and *Mr. Jervis*.

This case has been argued as if it were an application to the Court for a new trial, upon the ground of a general misdirection, whereas the

question is upon specific exceptions. The statute\* provides, "that the judgment shall be given according to the exceptions as allowed or disallowed." It was the object of the statute that the trial of the Judge should be limited to the precise exception. If new exceptions are to be argued, the Judge is treated unfairly. It has been decided, that a party is not at liberty to go into the general question.† If the matter is on the record as a bad declaration, the whole record being before the Court, it might be questioned. The question here was limited to the objection, that the Judge refused to direct the jury that in order to avoid the deed, the unsoundness of mind must amount to that degree which constituted idiocy. This raised the question, whether any incapacity short of idiocy could avoid a deed at law. But with this is now mixed up another part of the Judge's address to the jury, which should have been made the subject of exception, if the parties intended to avail themselves of any objection to it. The point was hardly raised in the argument of the case below, and, in fact, was not open for discussion even as to this point. The question put by the Judge is in substance whether the party was capable of understanding the deed which he executed, not merely as to the general propriety of his conduct.

The letter of the writ, in a commission of lunacy, requires the jury to inquire whether the party is lunatic or idiot, but now that form is disregarded, and it is held sufficient to find the party of unsound mind. Why should not a similar change be admitted in the practice at law.

\* W. 2, 13 Ed. 1. † *Warre v. Miller*, 4 B. and C. 538.

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Other rules of law have undergone equal alteration. The rule as to access on a question of legitimacy. The rule that a man cannot stultify himself.\* So drunkenness is a good evidence on a plea of *non est factum* and delivery, as an escrow may be given in evidence on the same plea. The real question is, whether the party is capable of understanding the deed he executes. The distinction between deeds and wills is not admitted. The question upon a will is, whether the testator has a mind capable of disposing of his property. The question upon a deed is substantially the same, and juries are always so directed in the case of deeds. The question in *Faulder v. Tilt* was the same as this. The direction was there given with a greater latitude, and the inquisition was held to be evidence.

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*Lord Tenterden.*—In forming an opinion upon this case, the House can only look to the bill of exceptions to ascertain the facts and questions for decision. Facts not there to be found must be wholly disregarded. Before I enter upon the substance of the question, it is right to advert to a topic so strenuously urged by the counsel for the Plaintiff in error, that six of the Judges were of opinion that the direction was calculated to mislead the jury. That is an argument which cannot prevail in this House. If all the Judges of Ireland were of one opinion upon this subject, and the House had entertained a different opinion, it would have been their bounden duty to act upon their own opinion. A court of error ought

\* 2 *Str.* citing *Thompson v. Smart*, 2 *Ventr.* See *Bridgman v. Holt*, *Showers's P. C.* *Thomson v. Leach*, 12 *Mod.* 173. *Salk.* 427, 675. See *Lord Raymond*, 313. *Comb.* 45.

not to be influenced by the judgment of those from whose decision the appeal is brought. (Here the noble Lord stated the substance of the record.)

The question arising out of this record is, whether the Judge's direction to the jury was correct.

It was argued by the counsel that the party was not a lunatic,—that is, that he was not at one time of sound mind and at another time unsound; but whatever the state of mind might be, that it was not temporary but permanent. The Judge told the jury that the question was, whether the party was of sound mind or not,—and that mode of stating the question was quite correct. He then proceeded to give a definition, “That to constitute such unsoundness as should avoid a deed at law, the party executing such deed must be incapable of understanding and acting in the ordinary affairs of life.” In that, perhaps, he went too far. The Judge then directed the jury that “It was not necessary he should be without any glimmering of reason; and as one test of such incapacity, they were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him.”

The counsel for the Defendant then required the Judge to tell the jury, that in order to avoid the deed at law, the unsoundness of mind must amount to idiocy, according to the strict legal definition of an idiot; and this being refused, the bill of exceptions was tendered and sealed.

It is impossible to read this record without seeing that the point of the objection is this, and this only,—that it was erroneous to direct the jury

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to make any other enquiry than this, whether the party was an idiot. If the Judge ought so to have directed, the direction given was erroneous : but it is impossible so to contend. The jury were in substance directed to enquire whether the party was of unsound mind ; and I find that the Lord Chancellor, according to the authorities, has held that a finding in these terms is sufficient.

As to the strict legal definition, I find in an old book on this subject, that if a person is capable of learning the alphabet he is not within the legal definition of idiocy ; yet it is impossible to hold that persons no further qualified are capable of executing a deed. The question at law is, whether, in substance, there is such capacity of execution ; and, in effect, the Judge in this case so put the question to the jury, when he told them that the question was, whether the party was of sound mind or not, and directed them to consider whether he was capable of understanding the deed when explained.

The observation as to the glimmering, will not make the whole direction erroneous, nor was it irregular or improper when considered in connexion with the other parts of the direction to the jury. In my opinion it was right.

The objection that the direction was too vague, indefinite, or general, cannot be taken upon this record. Counsel intending to raise such objection, should call upon the Judge to give more specific direction, that he may have the opportunity of correcting his error.

*Lord Plunket.*—I concur in the proposed judgment ; it is unnecessary to assign the reasons. But as to the ambiguity of the direction, if that

is to be made a ground of objection, it should be distinctly stated to the Judge at the time, and put on the record. The ambiguity of the direction would then be a question for the consideration of the Court of error.

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Judgment affirmed.

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## IRELAND.

(COURT OF EXCHEQUER.)

JOHN O'NEILL, Esq. - - *Appellant.*

The Right Honourable JAMES  
 FITZGERALD, JAMES BURKE,  
 and the GOVERNOR and COM- } *Respondents.*  
 PANY of the BANK of IRELAND }

By the stat. 23 and 24th Geo. III. of the Parliament of Ireland, for securing the monies of suitors of the Courts of Chancery and Exchequer, by depositing the same in the National Bank, which provides for the appointment of an Accountant-General for the Court of Exchequer, it is enacted that "So long as he observes the rules thereby, or by the Court to be prescribed, he shall not be answerable for any monies which he shall not actually receive, but that the Bank shall be answerable for all monies deposited with them;" and regulations for the transfer of stock are specified in the act.

Under this act A. was appointed Accountant-General of the Court of Exchequer, in the year 1796.

In the year 1810, A. executed a power of attorney, authorising S. B. his chief clerk, to make transfers in the Bank books of any stock, of which A. should first have executed a transfer draft under his hand, on check paper, pursuant to the orders of the Court. This power was deposited at the transfer office at the Bank.

Under this power S. B. producing a certificate or transfer draft, purporting to be signed by A., but in fact forged, and in several respects not conformable to the particulars required by the power and the statutory regulations, obtained a transfer of stock from one cause to another, for the purpose of supplying deficiencies in the stock in the latter cause, which had been caused by transfers under certificates formerly forged by

S. B. Upon the discovery of this transfer from the first to the second cause, two creditors in the first cause, who had proved their debts, made a motion in the cause, calling upon A. to refund the stock transferred; which, after hearing affidavits of the Appellant and the Bank of Ireland, was ordered by the Court. Upon appeal against this order, it was questioned whether the Court of Exchequer had jurisdiction to make such order by a summary proceeding, not in a cause, and whether the House of Lords had jurisdiction to entertain such appeal. But eventually the order was reversed.

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**T**HE Appellant was Accountant-General of the Court of Exchequer in Ireland.

In the year 1810 he executed a power of attorney, by which he appointed Sampson Browne the chief clerk in his office, his attorney, for him and in his name to transfer, in the books of the Bank of Ireland, all government and other stock of every kind, which should be in the Bank on his account, as Accountant-General of the Court, and which the Appellant should, by draft under his hand, written on cheque paper, (as usual in his drafts as Accountant-General on the Bank) transfer, pursuant to the order of the Court: And the Appellant, by the power of attorney, authorised and empowered Sampson Browne, in the Appellant's name, to do all acts required by the forms of proceeding in the Bank, which should be necessary for completing the transfer of such stock in the books of the Bank, as the Appellant should, by such draft under his hand, transfer; and thereby ratifying all such lawful acts as Sampson Browne should do, for the purpose of carrying such transfer, as the Appellant should so execute, into full and complete effect.

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The cheque paper, mentioned in the power of attorney, was paper having on it an impression in copper-plate, with blanks for names, dates, and sums, to be filled according to each occasion, so as to make a certificate that the writer had transferred certain stock as therein stated.

This power of attorney, thus restricted, was deposited in the Bank.

Sampson Browne, on the 16th December, 1818, produced at the Bank a certificate, bearing date the 14th of that month, entitled, in two causes then depending in the Court of Exchequer, viz. Blakeney and others against Annesley and others, and Hickey against Fitzmaurice and others. The certificate was in the words and figures following :

December 14th, 1818.

Blakeney and others *a.* Annesley and others.

Hickie *a.* Fitzmaurice and others.

Pursuant to order, dated 7th December, 1818, I do hereby transfer from the credit of the first cause to the credit of the second cause, Government stock at five per cent. to the amount of one thousand nine hundred and twenty pounds, two shillings, and one penny, which place to my account in said second cause.

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£1920 2 . 1 5 per cent. Gov. stock.

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JOHN O'NEILL,  
JOSEPH MACARTNEY.

To the Governor and Company  
of the Bank of Ireland.

This certificate was written on plain paper, and

the whole of the writing on it, except the name Joseph Macartney, was that of Sampson Browne.

After the certificate had been examined and passed by the proper officers of the Bank of Ireland, the transfer was immediately completed.

At the time when the certificate was brought to the Bank, the balance of 5 per cent. stock to the credit of the cause of *Hickie v. Fitzmaurice*, was 1549*l.* 2*s.* 3*d.*, and the sum of 1920*l.* 2*s.* 1*d.* having been added to the sum of 1549*l.* 2*s.* 3*d.* 5 per cent. stock, by means of the transfer, the balance of 5 per cent. stock to the credit of the cause then amounted to 3469*l.* 4*s.* 4*d.*

Afterwards, on the same day, Sampson Browne produced at the Bank another certificate, which was in the words and figures following :

Hickie	}	To the Gov'. and C <sup>o</sup> . of the Bank of Ireland. Accountant-General's Office.
a.		
Fitzmaurice and others.		

IN THE COURT OF EXCHEQUER.  
5 per cent. Gov. stock.

No. 1241.

£3082 10 10

COURT OF EXCHEQUER.

Pursuant to an order, dated the 9th December, 1818, I do hereby transfer to Harman Fitzmaurice, or James Fitzmaurice, his attorney, government stock at 5 per cent. to the amount of three thousand and eighty-two pounds, ten shillings, and ten pence, which place to my account in the above cause.

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Provided that, if this draft be not paid within one month after date, the same shall be void.

JOSEPH MACARTNEY.

JOHN O'NEILL,

Dec. 16th,  
1818 eighteen.

*Accomptant-General of the  
Court of Exchequer.*

This certificate was on the cheque paper, and the whole of the writing at foot thereof was of the hand-writing of the Appellant.

On the production of this certificate, the transfer mentioned in it was immediately completed, the fund being then sufficient for that purpose, by reason of the preceding transfer to that cause.

On the 10th of February, 1820, a notice, entitled, in the cause of Blakeney and others against Annesley and others, was served on the Respondents, the Governor and Company of the Bank of Ireland, on behalf of the Right Honourable James Fitzgerald and Jane Bourke, creditors under a decree made in the cause, of an application intended to be made to the Court of Exchequer to oblige the Appellant to replace the sum of 1920*l.* 2*s.* 1*d.* government stock; and that the Directors of the Bank should permit an inspection of their books and other documents relating to the account in the cause, or furnish a copy of the account to the attorney of the said creditors. In support of this application, affidavits were filed by the solicitor of the applicants, and by the Accountant-General of the Bank.

On the 15th of February, 1820, the Court of Exchequer made an order that the Bank should allow the parties to inspect the books and documents relating to the account, or furnish a copy of it; and that the Accountant-General should

replace the said stock and the interest thereon, unless cause should be shewn in four days after service of the order.

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The Appellant made an affidavit, stating that the document of transfer was a forgery, and the transfer made without authority, and contrary to the form in which he was accustomed to make transfer drafts.

On the 22d of February, 1820, the Appellant's affidavit having raised a question in which the Bank might be concerned, the Court, to give them an opportunity of laying the facts, on their part, before the Court, by affidavit, ordered that the motion should stand over till the Saturday following (February 26th.)

On the 25th of February, 1820, an affidavit was made by Mr. Brabazon Stafford, the transfer officer of the Bank of Ireland, stating the power of attorney, the course of business, the transfers of the 1920*l.* 2*s.* 1*d.*, and of the 3082*l.* 10*s.* 10*d.*, the state of the account in the cause of Hickie against Fitzmaurice, and a transfer by the Appellant in December, 1819, some former transfers of the same kind which had been acted on by the Appellant, and the transfer then in question; insisting, that from the whole it was manifest, that the course of business, in such cases, was authorized by the Appellant, and that the particular transfer in question was known to him; and that, by so acting on it, he had deprived the Bank of the power of transferring back the stock in question; had affirmed the act of his clerk, if defective before, and had discharged the Bank from all responsibility thereon.

On the 26th of February, 1820, the Court, on the application of Appellant, ordered that the



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not a party in the cause. There was no motion that the Bank should replace the stock, nor in the alternative that the Bank or the Accountant-General should replace it. They were ordered to produce their books, and having complied with that order, how could they be made parties? It being admitted that the Appellant in this proceeding does not seek to make them liable, how is it that they are brought here?

With respect to the injury to the parties in one way, the Court might have redressed it. If a sum of money, by means of a forged instrument, is transferred from one cause to another, the Court might order it to be re-transferred.

If the Accountant-General is an officer of the Court, they may have jurisdiction; if not, they have none. The order is a nullity, and how can it be the subject of appeal?

If at all the subject of appeal, it must be so as between the Accountant-General and the persons who applied for the order. If they are made parties, how can the Bank of Ireland be brought in?

If a short order cannot be made, but the proceeding must be by suit, for what purpose should we send it to a re-hearing in the Court of Exchequer, where they can make no order? How are the Bank parties? On notice from you they appear, being mere affidavit-men. You cannot summon witnesses to appear as parties. The order is upon the Accountant-General to re-place the stock, and then, upon the supposition that he might be unable to do so, a power is reserved to the creditors to make such application as they may be advised. How do the counsel for the Appellant shew that the Bank of Ireland are par-

ties? It is said to have been treated in the Court below as an interpleading suit. It was an application of creditors in a suit to have money replaced. An order was made for that purpose on the Accountant-General. If he is an officer of the Court, there might be jurisdiction; if not, then the question is, by what right the jurisdiction was exercised? If this was a case in which there was no jurisdiction, and the House entertains an appeal, the consequence may be, that all orders in the Courts of Chancery and Exchequer may be brought here by appeal. If there is no redress here, there may be elsewhere, but it is not our duty to tell the parties what other Courts have jurisdiction.

The question as to the jurisdiction of this House must first be argued. The petition of appeal asks that the Bank of Ireland may answer. Suppose the Accountant-General to be civilly responsible, and an action brought against him, if the Plaintiff in the action had failed to obtain a verdict, could the Court of Exchequer have then made an order upon him in this summary way, without suit? It is clearly made upon him now as an officer of the Court. The Appellants may consider whether they will proceed to argue the question of jurisdiction. In the mean time the order is not to be drawn up. If they proceed no farther, the Bank of Ireland must have their costs.

*Lord Redesdale.*—The Act of Parliament makes the Bank liable in case the Accountant-General observes the directions of the Act. But this is a summary proceeding; I doubt whether it is a subject of appeal.

If this had been the fraud of an attorney of the

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Court, and they had ordered him to re-place the stock, is there a jurisdiction in this House to entertain an appeal? It is a very important question, and might open the door to a flood of appeals. Suppose this had happened in a Court of Law, could any application have been made? The jurisdiction, I believe, was formerly much more extensive than it has been exercised now for many centuries. There is no precedent of appeal upon any summary order of this kind. It was much debated formerly, whether orders in the matter of appointing guardians could be the subject of appeal. There is a general notion that the jurisdiction now exercised by the House of Lords, belonged to and *was derived* from the ancient Parliament. They certainly exercised a much larger jurisdiction. I find in the rolls of Parliament, that the Commons contended that the appeal ought to be to the whole Parliament, but this happens to be in contradiction to the disclaimer of the Commons in the reign of Henry the Fourth.

In the case of Gibson, an attorney, who forged a certificate, the indictment was laid with intent to defraud the Bank of England. There was no application to the Court of Chancery in that case. According to the case made by Mr. O'Neill, there is no forgery as to him; for he says he is not answerable. It is, therefore, a fraud or forgery with intent to defraud the Bank of Ireland, or parties, it does not appear which. There was a power to Browne which might affect the question of forgery. There is a difference between the Irish and the English acts upon this subject. Here the order itself is required to be produced at the Bank. Supposing the Bank of Ireland not to be parties responsible in this proceeding, the difficult

question is, to know how to dispose of the matter as between the Appellant and the other parties. If there is no jurisdiction in this House to give redress upon appeal, and the Court of Exchequer in Ireland should proceed by attachment against Mr. O'Neill, for disobedience of the order which is now the subject of appeal, then, upon a writ of habeas corpus, or an action for false imprisonment, the question as to the jurisdiction of that Court would be raised.

As far as the House is concerned there are two questions: first, whether we have jurisdiction as to the Bank of Ireland; secondly, as to the other parties. As to the latter, it is material to consider on what ground the Court of Exchequer could make the order. Probably only upon the ground that the Accountant-General is an officer of the Court, subject to its summary jurisdiction. If so, this would be a precedent applicable to every case where an Attorney or other officer of the Court was censured. Every such case would be the subject of appeal to the House of Lords.

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The case was again brought before the House in 1825.

For the Appellant—*Mr. Hart* and *Mr. Shadwell*.


*Mr. Hart*.—The first question arising is this, was the order in itself an extra judicial order, such as it was not within the competence of that Court to have pronounced against such an officer; and, in the next place, if it was not an extra judicial order, such as it was not competent to the Court to pronounce, then whether it was not erroneous.

By the principles of the law of this country,

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no subject of property can be finally decided without ultimate recourse to the protection of the superior judgment of the House of Lords, in reviewing those decisions which are fit subjects of appeal, and the present appeal was therefore presented to your Lordships. As I understand the case, the consequence of that appeal was to bring to your Lordships' view two points: first, whether the Court below exceeded the limits of its jurisdiction—if it did, then whether the House of Lords is not a proper tribunal to bring that Court to a sense of its duty, in keeping within the limits of its jurisdiction; or if not, whether the subjects of this country are in this dilemma—that although in causes depending between suitors upon subjects of property, where a Court acts, and acts judicially in the decision of rights, there is, in every case, an appeal to your Lordships to review the judgment; yet, if the Court thinks fit to travel beyond its jurisdiction—to exceed the proper bounds which the constitution and law of the country have prescribed—that neither your Lordships have a right to rescind orders so pronounced, nor any other tribunal that we are aware of, or of which we have been able to acquire any information from the learning of those who have looked into the subject.

It has been urged, that this House does not originate causes—that your Lordships only exercise jurisdiction upon the ground of appeal from some inferior tribunal—that in cases where there is no suit depending, your Lordships can take no notice of any injuries inflicted upon rights of person or property, however grievous they may be—in other words, that your Lordships will not permit your House to be occupied by original com-

plaints, but only to review those grave and solemn decisions, which it shall be considered as fit for the wisdom of a superior tribunal to set right when complained of. I admit that to be the case, and that in no instance where rights of property are infringed, can the party whose rights are thus affected, come originally before your Lordships. The case must go through the ordinary tribunals in the first instance, and those who have ground of complaint against the decisions of those tribunals, must come by appeal to the House; the rights of property between suitors cannot in any case, by any process or course of proceedings, which the Courts in this country admit, be so finally concluded as not to come under revision of your Lordships' judgment; but then a question arises whether your Lordships, who exercise a control over the judgments of the Courts below in rectifying erroneous judgments, are precluded from looking into the grounds of those judgments, to see whether those Courts have travelled beyond the authority which the King, who constituted them, intended to vest in them for the distribution of justice among his subjects.

If complaints on this subject were of frequent occurrence, we should probably have some precedent on subjects of the kind, enabling us to see how, when Courts of Justice in this country, I mean the Superior Courts of Justice, travel beyond the line of duty prescribed to them by the law of the country, that transgression is to be corrected. That there must be some mode of doing it no one can doubt; one would not attribute such an anomaly to the law of England, as to suppose that a regular judgment between parties is always

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subject to review by your Lordships, as a tribunal of appeal, and yet that the misconduct, the mistakes, and the errors of judgment, in Courts below, in deciding that which they had no authority to decide, is of a description not to come either within the limits of your Lordships' authority, or the cognizance of any other known authority in this country. That would be an anomaly, an absurdity which no man could impute to the system of English law. There is that species of regular gradation of authority in this country, that every inferior Court has a superior tribunal to correct its errors, of whatever description those errors may be, in a regular gradation, until they travel up to your Lordships' House, and here, as there must be in every established Government, they find an ultimate judicature. The King, who is the fountain of justice to all his subjects, acts, in distributing that justice ultimately through the judgment of the House of Lords, in all decisions upon rights of property, and your Lordships have the jurisdiction to control the Superior Courts within the limits of their authority, as those Courts have to control the inferior Courts of Justice, who have peculiar jurisdictions.

The Ecclesiastical and the Maritime Courts of this country are as much a component part of the judicial establishment of the Kingdom, are as much vital institutions, original in themselves, as the Court of Chancery or the Court of King's Bench; but they are, by the policy of the law, placed in a degree of subordination to other Courts, and as their jurisdictions are peculiar and limited, confined to the cognizance of a certain species of causes, whenever they travel beyond

those limits which the law has prescribed to them as the extent of their jurisdiction, the Court of King's Bench, or the Court of Chancery, as occasion may be, issues a prohibition, and stops them, by telling them that they have erred in taking cognizance of such subjects. Now as when the Spiritual and Maritime Courts exceed their authority, the constitution has provided a superintending control to recal them within the limits of their jurisdiction, is it not a necessary consequence in principle, that where those Courts, which are Courts liable to be appealed from in the decision of rights, by mistake, or from any other motive, go beyond the limits of their authority, in taking cognizance of subjects which are not within their cognizance, there must be inherent in the law of this country some tribunal to which the subject may resort, to have them brought within the limits of their duty. If there be no such tribunal the dilemma must arise, that a subject of this realm, however aggrieved and oppressed by extra judicial acts, may have no remedy: unless it be said that the law places a remedy in his own hands, that is, that whenever a Court of Justice acting in a matter not within its jurisdiction, thinks fit to affect the person or the property of the subject, inasmuch as such acts may be considered as acts *coram non judice*, the subject is entitled to resist *manu forti*. Unless it be argued that such is the remedy which the law prescribes, I have not been able to find any other mode by which such an error can be controlled and corrected, except by recourse to this House.

We know that within almost the memory of man, the jurisdiction of your Lordships, as an appellate jurisdiction, has been the subject of


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question and of dispute. When appeals from the Court of Chancery were first brought here, complaints were made to the House of Commons, and the House of Commons pretended to exclude the interposition of your Lordships in reviewing orders of the Court of Chancery, upon the ground that it was affecting the property of the subject, and they assumed the right, not to control your Lordships directly in taking such cognizance, but they assumed the right of imprisoning those who should presume to execute your Lordships' orders. They went further, and assumed the right of imprisoning those members who should think fit to resort to your Lordships to review judgments between commoners of the realm decided in the Court of Chancery. The Commons, at that period when their own authority was not very great, might be willing to arrogate a little more, and the other party be willing to concede a little less as to the authority of this House. I have not been able to find, supposing the Commons of England had carried their point in excluding your Lordships' jurisdiction in cases of appeals from the Court of Chancery, how they would act where one of the suitors happened to be a commoner and the other happened to be a peer of the realm. But the subject was at last settled in a way, the benefit of which has resulted to all the owners of property in the realm.

Your are here for the purpose of hearing appeals, as well as for the purpose of assisting the King in his great council of the nation, and there must be in your Lordships the right to control the King's Courts, because you sit here under the direct authority of his Majesty,

to review those judgments which in his personal capacity he was incapable of reviewing, but which in his political capacity it was his duty to have reviewed. That being settled, it seemed to me to follow as a necessary consequence, where your Lordships have jurisdiction in appeals from decisions between A. and B. contesting rights of property in a cause, that if that Court whose decision was subject to review and appeal before your Lordships, thought fit to step aside from the parties and to make an order upon a subject affecting his property, that must fall to be considered also as subject to appeal, being an excess of authority. It would be very desirable to ascertain what other tribunal could take cognizance of such an excess of jurisdiction. Although I have understood that the limits were not very accurately defined in former days, that the King, sometimes in Parliament, sometimes by his Privy Council, sometimes by portions of that Privy Council, authorized by commissions to act concurrently, and at other times by your Lordships alone, determined on matters of appeal; yet, looking at those views of the case which are now presented to us, the present alternative only is this, that either your Lordships or the Privy Council must have jurisdiction upon the subject, or that it is the fact that suitors and individual subjects of his Majesty throughout the kingdom, may be aggrieved to any conceivable extent, and yet not have any remedy against that grievance.

No man will presume in the existing state of our constitution, to say that a petition to the King alone could be attended to, for the purpose of looking into subjects of that description; no man

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will suppose that his Majesty could act in any other way than through one or other of the great councils, namely, your Lordships, as the first and the most important of those great councils, or the Privy Council, who is to advise him as to the general affairs of the kingdom. As to the limits of distinction between these two great and supreme tribunals, whose judgments are not subject to be reviewed, but constitute the law of the country as conclusively as if a statute had been passed upon the subject, (I do not say makes the law, but is declaratory of what the law is,) your Lordships are the King's council for regulating and controlling those legal decisions respecting rights of property that occur between the King's subjects within the limits of the kingdom of England; and the office of the Privy Council, as far as it goes, is to regulate the rights of property that are referable to those foreign dependencies, and those other questions of judicature that do not come within the ordinary control of the King's Courts of Justice, and which must be ultimately decided where judgments are erroneous, or where Courts travel beyond their jurisdiction.

It would be a singular state of absurdity in the law of England, that if the Court of Chancery, between two individual suitors, were to make a decision which is subject to appeal, they may come to your Lordships to rectify it, because an order is made between A. and B., the suitors in the Court; but if the Court pronouncing an order in that cause, think fit to direct that a third person, not a party to the cause, shall pay the whole amount of the demand from the one to the

other, or to make an order which will subject that individual to imprisonment, your Lordships' hands are tied from setting that right, merely because the individual whose rights of property, and the freedom of whose person, is affected by such an order is not a party named in the suit; that your Lordships must say, here we are in a state of imbecility, we can give no relief; true it is that order is made in a court of competent judicature; it has all the colour of being a judicial order, and if it were a judicial order deciding the rights of property of individuals in the cause, we could correct that which is erroneous; but as the Court has thought fit not to decide between the individual parties as to the rights of a party, but has made an order that a third person shall pay the whole subject in demand, that being the case, the subject must either submit to pay the sum so awarded against him, or find out, God knows where, some other tribunal to do him right upon that subject.

Let the Courts act as erroneously as they please; and for the purpose of this argument, I may suppose the Court of Justice below to act from the most corrupt motives that can be attributed to persons acting in a judicial character, I will suppose the judge to be intending to benefit himself, and to make an order against an innocent third person to pay a sum of money, which, in circuitry must otherwise have come out of his own pocket, I may be told that with respect to such nefarious conduct the law is open to impeach a Judge who so acts, that he may be proceeded against criminally; but, my Lords, what answer is that to the innocent subject, who wants not to vindicate the justice of the country at large at his

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own expense, and at the loss of all that he possesses in the world, but who simply desires to be restored to that state of quiet possession of his rights, which, without the unjust intervention of a Court of Justice he would not have been deprived of. We know that the law is open wherever violated, and however high the subject who dares to violate it, to the vindication of right by criminal proceeding; but that is not concurrently with the title of the individual whose rights of property are infringed, by resisting that infringement by the ordinary legal modes. If this order was extra judicial on the part of the Court below, I shall hardly be told that such a case is not subject to a revision by your Lordship, but was a void and null act, which a subject may resist *manu forti*; I shall hardly be told that the law of England, in this state of civilized society, puts any subject, of any condition, under the obligation of raising commotion in the country and resisting by force. If it appears to be a regular order of a Court of Justice, I shall hardly be told, if I understand it rightly, that the law of the country looks not to so important a condition as that of preserving the peace of the community, and omits to provide that in no case shall the subject be under the necessity of protecting himself against the violation of his person or his property by his own hand, or by the assistance of his friends, but that in all cases where they are violated he shall have redress by legal means, pointed out to him by the law.

If that be the case, I apprehend that those legal means must be by application to this tribunal in the nature of appeal, to be entitled undoubtedly in a cause in which the order aggrieving the

subject has been pronounced, and which your Lordships will take cognizance of as an existing cause, to see whether any order has been made in that cause which the law of the country does not sanction.

Looking upon this case therefore as if it were new, as if your Lordships were for the first time to assume, or to repudiate a jurisdiction upon the subject, I submit to your consideration, whether you would not necessarily make a precedent. All cases that depend upon precedent, must at some time have existed in a condition in which the precedent was to originate, and in the absence of all precedents in Courts of Justice, you only look at the reason, at the fitness and the principle of the jurisdiction proposed to be exercised, and doing so you make the precedent, because no record of any anterior proceeding exists; but in making a precedent, the Court does not make the law upon the subject, but declares by the precedent, that that which they are doing is inherent in the constitutional law of the country, and if the occasion has never before arisen, which required the Court to make such an order, it then becomes fit that an order should be made, not only to prevail in the instance of the existing case, but to guide the judgment of all future Courts in similar subjects. If this appeal were totally destitute of precedent, I should with great confidence submit to your Lordships such would be the principle on which the House would act. It being admitted that in an order regularly made between suitors in a cause, it is universally subject to review by appeal to this House, I should contend that *a fortiori* whenever the Court goes

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beyond its jurisdiction and affects third persons, they have a right to seek refuge at your Lordships' bar, to see whether such an order was or was not a just order. There may be two grounds on which you may decide a case so presented, the first is, that the order is irregular—is extra judicial, that it seeks to attach and affect the person and the property of a subject who is not a party to the suit, that the Court therefore had no right to make such an order, and upon that ground you would rescind it, leaving those who obtain the order to pursue the regular course, whatever that might be, to attain the same end which such extra judicial order was intended to produce. If it be supposed that the order was not extra judicial, would you not hold as an appellate jurisdiction, that as the making of that order was within the competency of the Court, that it must be equally within your competency as a Court of Appeal, to review that order. It cannot be an order legitimately made by the Court below, but by an irresistible inference it must be subject to the judgment of your Lordships.

I have been contented to take this, as a case in which the Court below had jurisdiction to pronounce the order, if in justice it was fit to be pronounced; but taking it to be so, it is competent to me to shew, that according to the facts of the case, this was not an order fit to be made, that the Court which made the order erred in its judgment, mistook the law, did not properly view the facts upon which it ought to proceed. I am only desirous to go into that case, if you think fit, to satisfy you that there never was pronounced in any Court, an order so deeply er-

roneous as this is, when you look at all the facts of the case.

*The Lord Chancellor.*—In the discussion of this case you have a right to assume that the order was as wrong as it possibly can be. The first question for the House to decide, is, whether it has jurisdiction, supposing it should be so? We had something of the same nature this morning.

*Mr. Hart.*—I am apprised of that case,\* and I apprehend there is no case more dissimilar in principle than that which we take leave to present to your Lordships. It is unbecoming in counsel, to solicit any Court of Justice to intimate what source of relief a party may resort to for justice. At the same time, looking at the great and valuable protection which you give to all suitors, for you are the last and only refuge, if a party is injured and aggrieved by proceedings in the Courts below, I know not what relief for such injuries can be had, if your Lordships say your jurisdiction is not co-extensive with that which is exercised in the Courts where such orders are pronounced. Some course must be pointed out, for that a failure of justice cannot take place by the laws of this country, I take upon myself to assume, without qualification and without doubt. At present I am bound to consider it as yet doubtful whether your Lordships have or have not jurisdiction, whether you will

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\* *O'Sullivan v. Hutchins*, D. P. 1825, M.S. The appeal was against an order of the Court of Chancery in Ireland, respecting an award made upon a submission to reference, under the provisions of the Irish statute, 10 W. 3. c.—and not in a cause. The case was argued on the 15th of February, 1825, and stood over till the 30th of June, 1825, when the appeal was dismissed, upon the ground that the House had no jurisdiction.



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or will not consider yourselves as having jurisdiction, for if you think fit to say you have jurisdiction, you have it as matter of course.

Before I advert to the cases of recent date, supposed to affect the present question, I will call your attention to a case that seems to me, to be precisely in unison with the present. I know it has been stated that it is but a single case, that however it may be a precedent, it was a precedent doubted at the time; but the same objection may be made to every precedent where one anterior judgment only exists. Where a claimant of justice comes to demand his rights at the hands of a Court of Justice, it is not usual to repel a precedent, by saying it has been decided once, and but once; true it is, that we can find but one instance in which the House has exercised the jurisdiction, but that arises not from any doubt of the validity of the precedent, but from the happy dispensation under which the subjects of this country exist, that they seldom have to complain that the King's ordinary Courts of Justice travel beyond their duty, either from intention or mistake, Lord Hale, that great and constitutional lawyer, upon the subject of appeals from the Court of Chancery, lays down a doctrine which I quote as not applying specifically to the case itself, with respect to the present application, but to the principle which governs universally the law of the country, applicable to the subjects' rights. He was of opinion, that it was highly unreasonable that the decree of a Chancellor, who may err as well as another man, should be conclusive, should be unexaminable by any other Court, but be as binding as the law of

the Medes and Persians, or as an act of Parliament.

He says,\* “ the Court of Parliament, as sitting  
 “ in the House of Lords, for the Lords Spiritual  
 “ and Temporal assembled in Parliament, are the  
 “ highest Court of Justice in the realm. Here  
 “ the judgments at law, of the greatest ordinary  
 “ Court of Justice, namely the King’s Bench,  
 “ are examinable and reversable for error, and  
 “ what reason can there be, that a decree in a  
 “ Court of Equity should have a greater sacred-  
 “ ness than a judgment at law?” Now I would  
 ask of those who mean to oppose this reason-  
 ing, what greater sacredness can an error of  
 judgment, if the Chancellor or any other Judge  
 sitting in Law or Equity, who travels beyond the  
 legal limits of his jurisdiction in making an order  
 not warranted by his jurisdiction—what greater  
 sacredness can such an order as that have over  
 an order pronounced by a judicial authority, acting  
 within its proper limits, but mistakenly exercised ?  
 I apprehend, the principle which I am now stating  
 applies emphatically to this case, and I do not  
 know how to reason this case in a stronger point  
 of view, than to say that it must be argued by those  
 who resist the jurisdiction of the House of Lords,  
 that in all cases in which a Judge confines himself  
 within the limits prescribed by law, but acts either  
 unwisely, erroneously, or corruptly, the House of  
 Lords can correct his errors in judgment; but where  
 he travels beyond his jurisdiction, and inflicts in-  
 juries a hundred-fold more grievous upon a subject

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\* Hale's Jurisd. of the H of L. c. 23.

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of the country, than he could have inflicted by any decision or decree he could judicially have made upon the matter in contention, that those injuries must remain unredressed, or at least it is not within the competency of the House of Lords to redress them. When he travels within the limits prescribed by the constitution you may control his decision, but when a Judge travels beyond the limits of his jurisdiction, and does an infinitely greater mischief, you cannot control him.

But there is a precedent which is precisely in point. The case \* of an appeal from the Court of Exchequer by a person not a party in any

\* The case was in substance as follows: An order had been made in the Exchequer containing the following recital—  
 “Whereas, upon the 26th of February last, upon motion on  
 “the part of Thomas Lord Wharton, it was ordered by the  
 “Court, that a commission issued out of this Court in the 15th  
 “year of the reign of King James the first, together with six  
 “several articles of instruction, and eight several schedules  
 “thereunto annexed, purporting to be a boundary and survey  
 “of the Honor of Richmond and the Lordship of Middleham,  
 “in the County of York, taken by virtue of the commission  
 “by Sir Timothy Hutton and Sir Talbot Bowes, Knights, and  
 “other Commissioners, and dated at Richmond, the 19th of  
 “October, 1618, should be left in the hands of Mr. Thompson,  
 “one of the attornies, but should not be received as a record,  
 “or filed, nor any use made thereof, or of the enrolment thereof,  
 “until further order:” The order then proceeds to recite, that  
 a motion was made “on behalf of Sir William Robinson,  
 “Baronet, and others, praying that the said order might be set  
 “aside, and that the said commission articles and survey might  
 “be allowed of as a record, and filed accordingly:” The order  
 then recites the evidence produced for the purpose of satisfying  
 the Court of Exchequer that it was an authentic document, viz.  
 that it had been taken from the files, and therefore ought to be  
 restored to the records of the Court. The effect of the evi-

suit, and against an order not pronounced in any cause. A cause was depending in the Court of

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clence, as stated, is to trace this parchment from the hands of one professional man to another, till recently found in the hands of a person who had got the papers of a Mr. Grainge. It was also shewn, that at a prior trial, within the limits of the commission, this document was used as evidence. The order then recited an affidavit on the part of Lord Wharton, opposing the filing of the survey. Upon these recitals, and upon view of the document and perusal of the commission and articles, and survey, the Court ordered the former order, which directed that the record, paper or parchment, should not be filed as a record, should be rescinded, and they ordered that the said commission articles and shedules, purporting to be the survey, be filed accordingly on the proper file, amongst the inquisitions and extents of King James the first.

From this order an appeal was entered by Lord Wharton. In the petition of appeal it was stated, " That the Appellant had  
 " purchased certain mines in question before this pretended record was brought into the office, and that if such writing  
 " should be suffered to be filed as a record, after such length  
 " of time, the searching the record office, which was the common security of every subject, would signify nothing; settlements and purchases would be easily defeated, and no man  
 " could be safe on his estate or inheritance. The Appellant  
 " shewed that the other Defendants in Chancery were not made  
 " parties to this appeal, because the Respondent Squire was the  
 " only defendant who made affidavits for the supporting the  
 " survey, and the principal person who solicited therein, and  
 " employed Thompson to file and enrol it." The Defendants  
 " petitioned the House of Lords, and " setting forth their case  
 " at large, prayed to dismiss Lord Wharton's petition, and discharge the order for their answering thereto. But the Lords,  
 " on the 22d of January, 1702, ordered that Squire and  
 " Thompson should answer Lord Wharton's petition, and Lord  
 " Wharton, on the 25th of January, 1702, obtained an order  
 " that Thompson should not be obliged to answer." Squire,  
 " in his answer, proceeded to state the grounds on which he  
 " objected to the order, and in the result, the House ordered,  
 " that the officers of the Exchequer should bring into the

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Chancery between Lord Wharton, Plaintiff,  
and Sir W. Robinson and others, Defendants.  
An order had been obtained by Lord Wharton

“ House the bundle or roll in which the survey of the Honor of  
“ Richmond was, which was taken in the 15th year of King  
“ James the first, the original affidavits upon which the survey  
“ was filed; the office book, in which there was an entry of a  
“ survey taken of the Honor of Richmond in the 7th of King  
“ Charles the first; and the survey also itself.” On the 7th  
of January, an objection was taken to the House taking cog-  
nizance of the order. “ Upon the 12th of February, 1702,  
“ after hearing Counsel upon the petition and appeal by Lord  
“ Wharton, touching the order of the 15th July, 1701, it was  
“ ordered by the Lords, that a trial should be had next term,  
“ at the bar of the Court of Common Pleas, by a jury of the  
“ County of Middlesex, in an action wherein this should be the  
“ feigned issue, viz. Whether the skins of parchment directed  
“ by the order of the Court of Exchequer of the 15th of July,  
“ 1701, to be filed, are the perfect, unaltered, exact, and entire  
“ commission and return first filed in the Court of Exchequer  
“ in the 15th year of King James the first.” Against this  
order there was a protest; eleven of the Peers, including Lord  
Nottingham, dissented from the decision of the House. The rea-  
sons of the protest are—first, “ Because we conceive that by  
“ this we assume a jurisdiction in an original cause; for these  
“ reasons: first, because there has been no suit between the  
“ parties in the Court of Exchequer, and consequently this  
“ petition cannot be called an appeal from that Court. Se-  
“ condly, although there was a suit in the Court of Chancery,  
“ yet one of the persons required to answer was not a party in  
“ that suit, and therefore, as to him at least, it must be an ori-  
“ ginal cause. Thirdly, though all had been parties in Chan-  
“ cery, yet it never was heard that an appeal lay from one Court  
“ that had no suit depending in it because there was a suit  
“ depending in another Court. Fourthly, because no Court  
“ can take any cognizance of a cause in which that Court can-  
“ not make an order, because very many are concerned in this  
“ record who are not before the House, therefore this House  
“ cannot take any cognizance of it.” (Signed) Nottingham, &c.  
See the Lords’ Journals, vol. 17.

upon a motion made in the Court of Exchequer, there being no cause depending between those parties, that a certain parchment, alleged to be a record of the Court, in the hands of one Thompson, an officer of the Court, might not be filed by him among the records of the Court, it being the object, as he apprehended, of the Defendants to the suit in Chancery, to make use of this parchment as evidence in that suit. This order was afterwards rescinded, by an order made upon the motion of Sir W. Robinson and others, and it was directed that the parchment, being a commission, articles and survey should be filed as a record of the Court.

From this latter order there was an appeal by Lord Wharton. It was objected that the order was not made in a cause, and that other persons, parties in the suit as defendants, were not before the House. The answer to this objection, so far as relates to the defect of parties, was that Squire was the only defendant who supported the order in the Exchequer, and employed Thompson to file it. Upon this state of things, the House of Lords directed that a trial should be had in the next term in the Court of Common Pleas, in which the question should be—whether the parchment in dispute was such record of the Court as pretended?

The House did, therefore, in that case, hold jurisdiction in the case of an order which was not made in cause, and although this objection was expressly taken and pressed. There was, indeed, a protest against this order of the House, but the protest rather adds to the authority of the order. In a new case, unanimity was not

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to be expected. The protest shews at least that the matter did not pass without discussion, and the decision is that of the great majority of the House, including the Chancellor, a great parliamentary as well as constitutional lawyer. It therefore, establishes a precedent deliberately argued which ought not now to be shaken. The opinion of the small dissenting minority was bound by the superior reasons and judgment of the great majority of the House, who thought it right and advantageous to the community that such a jurisdiction should be exercised. The reasons given in support of the protest, appear to me to be inconclusive. The first objection is, that by the order they assume jurisdiction in an original cause, because there was no suit between the parties in the Exchequer, and that the petition could not be called an appeal from that Court. But how is it an assumption of jurisdiction in an original cause, to make an order in a matter which had been adjudicated in an inferior Court? It cannot surely be necessary, that in a matter adjudicated, however important, A. should be personally a plaintiff, and B. personally a defendant, to make it a fit subject of appeal. There are in fact, many cases subject to appeal, where neither appellant nor respondent were parties in the suit; as where a third person has become the purchaser of an estate sold under a decree in a suit, it has been considered \* that he might be dealt with as a party in the suit. Although he is not actually before the Court as a formal

\* See *Watkins v. Maule* in Chancery, an order 23d February, 1825, rescinding a purchase. There was an appeal by the purchaser to the House of Lords, upon which the order was affirmed. *Bailey v. Maule*, MSS. 3d May, 1825.

party, yet being affected in his rights by an order discharging his contract, it has been held competent for him to appeal against such order to the House of Lords, if he thought such order erroneous. Why was it assumed that such a purchaser being no party in the suit might appeal, plainly upon this ground, that the order affected his right of property acquired by the contract. This was a subject incidentally brought into the cause; but the purchaser was neither plaintiff nor defendant. It was argued that he would be put to file an original bill, but it was considered by the Court, that if the order was erroneous it would be the subject of appeal.

*The Lord Chancellor.*—I have from Lord Redesdale a copy of a case, in which an appeal to the House of Lords was presented against an order of a Court of Equity rescinding a purchase.\*

*Mr. Hart.*—Then there is another authority for holding that the House of Lords has jurisdiction by way of appeal against orders of Courts of Equity, affecting the property of a subject not a party in a suit; and in truth, it is a refined and metaphysical distinction to entertain jurisdiction between party and party in a cause, and to refuse relief to a third person more deeply affected in his rights by an order in the same cause.

In the case of Lord Wharton it was not an order in a cause, it was an order *ex parte*, and yet an appeal was entertained. In the case now before the House, the order was made in a cause most injuriously affecting a third person, and why it should be less an order in a cause, and

\* Probably the case cited in the note, p. 54, in which Lord Gifford and Lord Redesdale spoke on the motion for judgment.

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by what magical operation it should be less subject to appeal than if it injured the plaintiffs or defendants in the suit for whose benefit it was intended, I cannot conceive. In general a Court abstains from making orders in a suit which affect third parties, but here the Court has made an order in a cause, and if it be erroneous, either because the Court had no jurisdiction to make such an order, or because having jurisdiction it is unjust, it is equally an order made in a cause affecting the rights and property of a third person, and must be a proper subject of relief by way of appeal to this House. The third reason for the protest I really do not understand, the reasoning seems to proceed in a circle : first, to assume a proposition and draw an inference from it, and then to endeavour to establish the original proposition by means of the inference.

There is a difficulty in supposing how the House should be precluded from making an order in which it directed that a document should not be filed as a record, because some parties were absent or should be present ; the House deciding merely between these parties, the one contending that it should be considered as a record, and the other contending that it should not, how can it be said that the House, when it came to a decision, that it ought not to be considered as a record, concluded the rights of absent persons by doing it ? Sir William Robinson failed in making out his title to have this document filed ; and made an authentic document, his evidence slipped from under him. By this order the House only exercised a jurisdiction to affirm the order

of the Court of Exchequer, in case the evidence should bear it out, but to disaffirm it in case the evidence should not bear it out; the House looking at the conflicting testimony, and thinking that the trial by jury was the proper mode of deciding the facts upon which the rights of property might turn, rather than upon affidavits, the House said the order may or may not be right, but certainly it is not right to confirm it without some preparatory steps to ascertain the facts, and therefore the House ordered that that Court which had stepped a little too forward in deciding facts as conclusive upon affidavits, should suspend the operation of the order it had pronounced, until a jury had decided whether it was an authentic record or not.

There may be cases in which the House of Lords may have no jurisdiction, and would not spontaneously exercise a jurisdiction. In the case of the Attorney General *v.* Wall \* the decision proceeded upon a different principle. Whenever the united legislature have thought fit by statutory enactment to give particular forms of proceedings for the remedy of injuries, and make no farther provision, then it is a principle of the law, that the statutory regulation being a jurisdiction collateral to the common law jurisdiction of the

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\* D. P. 1822, 1824, MS. The case was thus:—Lands subject to mortgages had been seized under an extent, a Commission of Bankrupt afterwards issued against the mortgagor, and an Act of Parliament was passed enabling the Court of Exchequer to make reference to the Master to ascertain priorities, &c. and make orders respecting the funds in Court under the extent upon motion or petition as in causes in Equity. The appeal was against an order made under this Act, and the House of Lords held that they had no jurisdiction.

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country, is not subject to the same mode of appeal as in other cases; for if the legislature had intended that an appeal should have laid from the inferior jurisdiction, it would have directed that there should have been such appeal. That is an old and inherent principle in the construction of statutes, and looking at a recent statute\* giving the new jurisdiction in cases of charity, by which the legislature enabled the Lord Chancellor or the Master of the Rolls to make certain regulations in charity matters, which it was not competent for them to make unless it was in an existing cause, the legislature foreseeing that by force of the natural construction of the Act of Parliament it would have prevented a review of the decision in the Court below, they provided that an appeal should lie to this House, if presented within two years; so far, therefore, from this Act of Parliament being an argument that you have not jurisdiction in those cases, it is affirmative, for it shews that in all cases arising out of the old established judicatures of this Kingdom, there shall be an appeal; but where there is a new statutory jurisdiction, if it does not expressly permit a suitor to appeal, it must be taken to imply that the case shall go no farther.

The case of the Attorney General *v.* Wall was of that description: it was a case of an extent, a purely common law process, and a statute was passed giving a new remedy to those who were entitled to equitable incumbrances upon the estates seized by the Crown. Such incumbrancer before the passing of the statute was obliged to go into a Court of Equity;

\* 52 Geo. III. c. 101.

instead of which it gives him a short mode of proceeding, by which he has his equitable rights ascertained without the delay and expense of a suit in equity; but when it gave him that mode of proceeding, it was provided that if he chose to adopt it, he must do it subject to the hazard of the judgment to be pronounced finally in the Court below. That is analogous to a new jurisdiction, and where a party chooses to submit to it, he cannot go farther in litigation. So again in the cases of bankruptcy a new Court is created; the Lord Chancellor sitting in the Court of Chancery, exercises an authority over the bankrupt's estate, and the claims of all parties, but it is the statute that gives to the Lord Chancellor authority to make orders that shall bind the parties, the statute creating a new jurisdiction; and it has been always considered as the true construction of that Act that it gave a jurisdiction not inherent in the law of this country, and therefore, this House cannot review decisions in matters of bankruptcy, as you may in the case of common law proceedings. With such nicety have the limitations of jurisdiction been settled, that in cases where serious questions have arisen, the Lord Chancellor\* with a forbearance not often necessary, is in the habit of saying that he does not wish parties to be bound by his individual judgment, and rather than bind them by an order in bankruptcy, he gives them leave to file a bill, so that if the same judge happens to preside in Chancery, and the party thinks he errs in judgment, he may go to the House of Lords, which is the refuge to all

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In the general assertion of jurisdiction, which was made by the House of Lords in that question which arose upon Sir John Fagg's case, the House of Lords by their notice to the Commons, represent the House as "the place where the King is highest in his royal estate, and where the last resort of judging upon writs of error and appeal in equity in all causes, and over all persons, is undoubtedly fixed and permanently lodged."\* I point your attention to the expression "all causes," because the order complained of in this case, is an order in a cause essentially differing from the case of the Attorney General *v.* Wall. There extents having issued at the suit of the Crown, the mortgagee, a special incumbrancer upon the estate of Paul Benfield, came in under the extent and the provisions of an Act of Parliament, without filing a bill for that species of relief which is ordinarily administered in the Court of Exchequer. It was argued in that case, that inasmuch as the proceedings which took place under the extent and the statute were denominated causes, and the orders made from time to time were styled decrees, that the particular order complained of, which was pronounced by the Court upon exceptions to a Master's report made in pursuance of what appeared upon the face of it to be a decree, it ought to be considered as made in the cause; but your Lordships were satisfied that it was not strictly speaking a proceeding in a cause in equity, however proceedings of that sort might have been by common practice and habit, entitled and styled decrees in causes.

\* See Hargraves's Preface to Hale's Jurisd. of the House of Lords.

That was the point decided in the Attorney General *v.* Wall.

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Now this case differs essentially from that, for here is a cause subsisting between parties. It appears there was an application made in the cause, as the respondent has stated himself, by persons who were not creditors in the cause as plaintiffs upon the record, but persons admitted as creditors in the decree made in the cause; they were the persons who applied against the Accountant General of the Court in the cause, for the purpose of having the stock in question re-transferred.

*The Lord Chancellor.*—The application here is to replace a certain quantity of stock. I think one of the questions may be whether the stock, by virtue of this instrument having got out of one cause to another, should not be re-transferred, or in other words, whether the party who caused the stock to be transferred should retain the benefit of a transfer which had been made by forgery.

*Mr. Shadwell.*—It could not have been done, for there was not stock enough to allow of a re-transfer into the cause of *Blakeney v. Annesley*.

Although this were to be considered as an order upon parties who were no parties in the cause, still there are a variety of cases in which a Court of Equity deals largely with the property and personal liberty of parties who are not parties in the cause. One of the most familiar instances is this:—I will suppose that a bill is filed by a residuary legatee against an executor to take an account; the decree directs an account to be taken of debts and credits; the creditors come in under that decree, though by

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no means parties to be bound in all respects by the decree, as they would have been in the case of a bill filed by one creditor on behalf of himself and others; but they come in as creditors, and the question is discussed in the Master's office, whether the debts claimed by them are or are not due. Now suppose a Court of Equity should think it right upon the claims made by the creditors in the Master's office not to give the creditors an opportunity to except to the Master's report; or suppose that leave were given to except, and the exception heard, and the Court decided against the creditors, and no leave given to file a bill, in what situation would they be placed? If a creditor under such circumstances were to file a bill, he would be met by a plea that the party was not bound to answer. What, under these circumstances, is the situation of a creditor, if the Court making such a decree is not to make it subject to revision?

Let me put the case of an administrator of a testator's estate, in which a legacy is carried to the account of a particular legatee, with leave to apply to the Court, and he does so, and the Court refuses to make an order:—I am putting, it is true, a strong case, but I am doing so in order to illustrate my argument:—in that case what must a legatee do, if not allowed to proceed by appeal upon his petition, for the legacy actually severed from the testator's estate and carried to his account, which would be a complete discharge to the executor? He would actually be without redress, unless the House of Lords were to control the decision of the Court below.

If the resolution of the House of Lords in the case of Sir John Fagg is of any avail, it must

be acted upon in such cases as I have put, and I can put cases in which the personal liberty of the subject might be affected by proceedings of the Court of Equity, which if the narrow doctrine now contended for were to prevail, no redress could be obtained ; suppose for instance, an injunction was granted to restrain a Defendant and his servants and agents, from doing a certain act in the common form of injunction, suppose that the Court should be satisfied that some person, bearing the character of servant or agent of the Defendant, had committed a breach of the injunction, and the Court being so satisfied, an order is made out in the proper form for the party to be committed to the Fleet ; what redress has the individual in that case ? If the Court chooses to stand by the order it has made, and this House does not give relief, he can have no relief whatever. In that case he can have no relief by Habeas Corpus, for if the Court has competent jurisdiction, which it has as matter of course, and the order is made out in the proper form, if the individual applies for a Habeas Corpus he would be remanded, and he might be compelled to linger out his existence in prison until the Court should relent and rescind its order, or this House would interfere. Suppose the case where an infant ward has been married, and upon a motion made against the parties, the Court of Chancery should order some clergyman to be committed to the Fleet upon the ground of having committed an offence against the jurisdiction of the Court, by having married a ward, and yet he may have been no party to the business ; is there to be

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no appeal in that case? I put these cases as those, which if they did happen, and could not be reviewed by the House of Lords, would entail the greatest misery upon the subjects of the country; and I have always understood, that the House of Lords assume a general jurisdiction in causes, for the purpose of rectifying orders which are erroneous, and all the cases I have put would be errors in orders, though the victims were not parties to the cause. Upon what principle is the House not to interfere? you will interfere, though no one of the cases which I have stated has been adjudged, or although there are no received cases prescribing rules to the House. The last application in all the cases which I have put, would be to your jurisdiction for relief, and if you did not interfere, there would be a defect in the administration of justice.

With respect to the cases which I first put, as to want of jurisdiction, they are grounded upon this reason, that there is no cause in Equity depending between the parties, but that reason totally fails in the cases which I have just supposed, and in the cases now at the bar; upon what ground therefore, can it be said that the House of Lords is not to interfere? In the case of the Attorney General *v.* Wall, there was no defect in the proceeding, as against the parties who claimed, for this reason, they themselves elected to go and claim their equity upon the common law side of the Court; that was a new common law proceeding given by the statute, but they might have filed a bill; and there is a case in Coke's Reports, where it appeared that

it was originally the practice for parties to file a bill, in order to have that equitable relief, which the statute entitles them to have in cases of extents; but if parties voluntarily intervene, and choose to take the course prescribed by the statute, that subjects them to the order of the Court, which must be final when once made. If the parties complain of that order, it was their own option to adopt that course. But in the case at the bar, orders are made in which the party has not voluntarily submitted to the jurisdiction, but attempted to repudiate or wished to avoid it; so that the reasoning applied to the case of the Attorney General *v.* Wall, is reasoning that cannot be applicable to the present case, for here the Accountant-General did not intervene, he asked nothing. I consider this, though it may be a case of the first impression with regard to particular features of it, as a case not governed by any one of the cases decided upon the point, and if so, then the only question will be, whether you will hold that a Court of Equity has any right to exercise unlimited jurisdiction over parties who are not parties in the cause? Would it not be a singular anomaly, that if there be a decree against a party in a cause which is erroneous, he shall have redress by an appeal to this House; but that where a person is a total stranger to the cause, an order may be made ruinous to his property, and injurious to his liberty, and such an order is not to be reviewed? You will long hesitate before you lay down a general rule in such cases, that this House will not interfere; for it is quite contrary to the principles of the constitution, that

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a person not a party in a cause shall be liable to have an order made against him which is not subject to review; it cannot be conceived that a Court of Equity has a larger power over persons who are not parties in a cause, than it has over those who are parties in a cause.

I conceive this to be a question of great importance, and a case in which you may soon have to apply the very same doctrine, whatever it be which you may lay down in this particular case, for there is now pending an appeal before the Lord Chancellor in the Court of Chancery, from an order made by the Master of the Rolls, in which he has refused to interfere with respect to a person not a party in the cause, it being an application praying that that person should do a certain act. It was asserted that a certain portion of stock was obtained in an improper manner, and a petition was presented praying that the individual in question should be ordered to replace the stock; the present Master of the Rolls dismissed that petition, and an appeal is now pending in the Lord Chancellor's paper; it is not, therefore, a mere speculative opinion, arising from the dictates of fancy, which we are calling upon your Lordships to pronounce, but you will have immediately to re-consider this point in another case.

I should conceive that in a case like the present, where there seems to be pregnant reason why the House should interfere in the case of an order made in the cause, that the House of Lords would be mainly aided by considering what it has actually done, where an order has been made without a cause being in Court.

*The Lord Chancellor.*—If no injury can be done without a remedy, how is it in the Courts of Common Law, where, although there may have been fifty erroneous orders in the course of the proceedings, this House cannot touch them? In the case of the Court of Chancery, the interlocutory orders may be appealed against, but there are many orders which may be made in certain cases, in which there is no appeal.

*Mr. Shadwell.*—The House of Lords assumes a general jurisdiction in orders made by Courts of Equity, in consequence of the magnitude of property, and the necessity, therefore, of interfering.

*The Lord Chancellor.*—I have asked many people why there should be that difference, and if they would give the real answer, they would say they cannot tell, though a person who practised in the Court of Equity, would be able to tell them without any difficulty.

*Mr. Shadwell.*—A Court of Law confines itself to one single point; a Court of Equity, particularly in the administration of an estate, undertakes to solve all manner of questions between all manner of persons, not only between the parties who have their names on the record, but persons whose interests may be affected, and which must be finally disposed of before it is possible for the Court to make a decree between the Plaintiff and the Defendant. So in the case of a residuary legatee, the Court must take care that a due portion of the fund should be paid to individuals who are properly entitled to it, and the mere severance of a fund from the bulk of the estate, is not sufficient of itself; so that

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there is the widest difference possible between an interlocutory order of a Court of Law, and an interlocutory order of a Court of Equity.

If in the case of *Wharton v. Squire* the House has actually entertained jurisdiction where an order was made not in a cause: what weight of precedent is there, or what precedent can be alleged in which the House of Lords has refused to interfere where an order has been made between parties? The cases cited are all beside the present: they are authority for the right proceeding of the House as far as they go, but do not furnish the least ground of argument for your not exercising jurisdiction in the present case. I should say *prima facie*, that the House of Lords will act up to the spirit of the resolution in Sir John Fagg's case, and it is not enough to be asked, where there is a precedent, whether the House will act or not? We have, even if there was no precedent, all the authority of principle in our favour, and no one case can be produced where the House of Lords has refused to interfere, where an order has been made on parties not in the cause; great inconveniences will be sustained, if this House does not interfere in cases of this description.

For the Respondents, the Bank of Ireland.\*  
*Mr. Horne* and *Mr. Phillimore*.

It is not true that there is a remedy by appeal to this House in all cases where there is no remedy elsewhere against erroneous judgments, or excess of jurisdiction; there are many cases wholly with-

\* The Respondents Fitzgerald, &c. had been served with process, but declined to appear, and the Appeal was set down as *ex parte* against them.

out relief by way of appeal. As for the case of purchasers and creditors who not being original parties, come in under the decree in a suit, they become by adoption for all technical as well as substantial purposes parties in the cause. The doctrine of Lord Hale that all decrees in Courts of Equity are subject to appeal to this House, is indisputable, but not applicable to the case before us. In the case of a bill by a creditor, a decree obtained by one is a decree for all, when they come in under it, and being in Court by their own act, they would be subject to the general jurisdiction in the same manner as original parties. This is not an exception to the rule, but an instance of it. There are two objections to this appeal, as it regards the other parties, first, that the order was made by the Court below upon its own officer, and secondly, that the Court had no jurisdiction to make such order.

In the case of *Wharton v. Squire* there was a case pending in Chancery between the parties, and a question arose whether a certain parchment in the hands of a private individual was a record of the Court of Exchequer, to be used as evidence in the suit in Chancery; the parties in the suit were applicants to the Court of Exchequer, and submitted to the jurisdiction, and by the order of the House an issue in the cause in Chancery was directed to try this question of fact. There was in that case, therefore, no question whether the Court below had jurisdiction to make the order, for the parties had submitted themselves to the jurisdiction. In this case one of our objections to the appeal is that the Court below had no jurisdiction to make

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this summary order. If this could be described as an order in a cause, the Bank of Ireland are not parties in the cause nor to this order. The motion was made by Mr. Fitzgerald against Mr. O'Neill; no order was prayed against the Bank, they merely made affidavits for the information of the Court, and are brought here improperly by the process of the House, no order has been or can be prayed against the Bank of Ireland.

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In the course of the argument, the Lord Chancellor made the following observations :—

*The Lord Chancellor.*—The case as it stands upon the appeal, states only a conditional order made, that the Defendants should pay the money, and the Bank should permit inspection of their books, and that that order should be made absolute, unless cause was shewn to the contrary. Cause was shewn to the contrary, and the order stated upon this appeal is only that Mr. O'Neill should pay the money. The order was absolute against the Bank to make them produce their books; the Bank appeared, they made no objection to the order, and with respect to Mr. O'Neill paying the money they have nothing to do; that is a mere question between him and Burke and Fitzgerald. If Fitzgerald and Burke did not put in their answer within a given time, then according to the practice of the House a petition should have been presented to the House, upon which an order would issue, calling upon them to put in their answer within the time limited, or the House would act upon it.

The journals are not evidence of the order made upon such a petition, and the service of the order upon the proper persons.

If you are both agreed to argue it as a question of merits whether the Court of Exchequer had or had not jurisdiction, that is another thing, but consent alone will not give this House jurisdiction.

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Whether the Court of Exchequer or whether this House has jurisdiction or not, the question now before the House is whether this jurisdiction existed at the time of making the order; I apprehend the House must determine that question, which it cannot do until the evidence is before it: I do not mean to prejudice the question at all.

With respect to the service of the appeal, the person who speaks of the service is Mr. Burke, the Attorney for John O'Neill, and he certifies that he had given notice to Connell O'Connell the Attorney for all the Respondents.

Under the standing order of January 1819, having presented your appeal, and no answer having been put in in proper time, you are empowered to set it down *ex parte* without any further notice; the result is, that the order so far as the Bank is concerned is right, because every thing is done by this order, that it was prayed the Bank should do; they therefore, have nothing to oppose. With respect to the rest it may be an argument between the counsel for Mr. O'Neill and the reasoning of the House upon what appears to be right to be done; the judgment of the House must be given upon that view, and the House must take care to be right upon it. The first question is as to the jurisdiction: the House itself must be satisfied that it has jurisdiction, if the House is satisfied that it



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has jurisdiction, you will go on upon the case as between O'Neill and the other parties who do not now appear; the Bank of Ireland are out of the field, they are entitled to their costs, and need not appear any more.

There will be no reply, if the cause is to be heard *ex parte* as against those persons who are not here; when you have stated your case against them, and they do not appear to state their case against you, your statement of the case leaves it to the House to decide. At the same time it is a matter upon which we shall be very glad to receive information, and if you have anything further to state we shall be happy to hear it.

If the House should inform you that it has jurisdiction, you will have to state your case upon the merits; but you will not have to state your case upon the merits as against the Bank. With respect to the new practice in the Court of Chancery, of an injunction restraining a creditor proceeding at law, though he is no party to a suit, that would be very grievous, if that person were not permitted to appeal against that injunction. Lord Thurlow never would adopt that practice, though Lord Rosslyn afterwards established it upon very mature consideration; he said, if a creditor by a motion in a suit in which he is no party, is stopped from going on at law, it is a very material thing to consider what his remedy is by way of appeal.

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On the 7th of March, 1825, the case came again before the House for argument upon the

merits, when the Lord Chancellor (Eldon) made the following observations : \*

*The Lord Chancellor.*—The first question which the Accountant-General of the Court of Chancery in Ireland makes here, is whether that Court had any right to proceed against him by order. That will depend upon the construction of the Irish Act of Parliament.

According to the statements in the appeal before this House, supposing the Court of Exchequer to have had jurisdiction by order, to have directed the Accountant-General to do this, they do not appear to have had any jurisdiction by the nature of the application to them to award any thing respecting the Bank, because the application to them was neither more nor less than that the Bank should produce their books. Nor was there any application of any body in the Court of Exchequer as far I can see to make the Bank answerable at all.

It is quite clear that the Bank in meeting the motion, that they should produce their books, appears to have entered into a sort of controversy as to who was liable; with reference to which the Court had no more jurisdiction upon that motion, to say whether they were liable or not, than the Court of Exchequer in Westminster Hall.

If the Court of Exchequer in Ireland had any jurisdiction to make the Accountant-General answerable by order, instead of making him answerable by bill—I think if they had proceeded as in all such cases as this, the Court of Chan-

\* Mr. Hart and Mr. Shadwell for the Appellant. The observations occurred at different periods in the course of the argument, which was *ex parte*:

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cery here would have done to bring all the parties before the Court, in order to give them all a hearing, the Bank among others might have been brought before the Court. It appears to me, that the proceeding is exceedingly defective, supposing the Court of Exchequer had jurisdiction to proceed against the Accountant-General. Whether this House has any jurisdiction at all in the matter is a different question.

I have said nothing conclusive on the subject of jurisdiction, because I know the matter is one of very grave consideration, whether the House has jurisdiction in this case; and that is under the consideration of a noble and learned Lord who knows more upon the subject than I can pretend to do. I have no difficulty in telling you that if the House has jurisdiction, the inclination of my mind will be to direct the Court of Exchequer to order a bill to be filed.

The first question whether we have jurisdiction must depend upon this: supposing the Court of Exchequer had no jurisdiction in the case, can we set them right. That is the first question, which in truth involves the question whether we have any jurisdiction in any such case as this or not; nobody I think can hear the case stated without having, (if there be such a thing,) a judicial appetite to exercise the jurisdiction.

I have communicated to the noble and learned Lord, to whom I have been alluding what has passed by way of argument here; some delay will occur before we can learn his opinion. I do not wish to intimate my own until I have his opinion.

Does it appear to have been considered in the

Court below, whether the Court of Exchequer had any authority to proceed by a motion against the Accountant-General?

If the Court had jurisdiction to proceed by motion against the Accountant-General of that Court, either they must have proceeded against the Accountant-General of that Court, dismissing from their minds all question of what other persons were to do, or they must have assumed jurisdiction to make other persons answerable upon application by motion, as they must have gone to this length at least, to hold that they would not determine that the Accountant-General of the Court was liable unless the matter were put into such a shape—a bill for instance, which would have brought before them all persons as against whom the Accountant-General might have a right to say that they were first liable; upon this question, it is a material circumstance that this money was paid without all those checks which the Act of Parliament required. The question then would be in what way the parties were to be brought before the Court and in what way, in point of fact, their liability was in issue before the Court of Exchequer.

If this case had been brought before the Court of Chancery in England, if an application had been made against the Accountant-General there, I have had no experience how the Court would proceed—I mean no experience in the article of charge against the Accountant-General; but I apprehend that the Court of Chancery would have said, file a bill, bringing all parties before the Court.

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The Bank appears to have agitated here the question not only of the Accountant-General's liability, but their own liability, and the affidavits go to that point; the application to the Court at the time had nothing to do with their liability.

The question in some way would be raised necessarily, whether the Bank was liable; there is no doubt if these facts are as they have been stated, that an action might be brought, and probably maintained too as well as brought.

If this House has jurisdiction, I do not think it will take much time to deliberate what it ought to do; whether it has jurisdiction or not, is a question of so much importance, that without the assistance to which I have before alluded, I do not think it right to offer to the House my advice. We will therefore, let you know when we shall be prepared to give judgment upon it.

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*The Lord Chancellor.*—There was a cause heard before your Lordships in which Mr. John O'Neill was the Appellant, and the Right Honourable James Fitzgerald and others were the Respondants: this was certainly a very important case, with respect to the value of the property which was in dispute between the parties, I mean the amount of the stock, for which the Accountant-General of the Court of Exchequer in Ireland was sought by a motion made in a summary way to be held answerable. That Court was of opinion, that they had jurisdiction to hear the matter in that summary way, and they were also of opinion that the Accountant-General of the

Court of Exchequer in Ireland, was answerable for that sum. He appealed to this House upon a motion made not in a cause, but upon a motion made in the Court of Exchequer in Ireland, to charge the Accountant-General of that Court, (regard being had to the special manner in which he was appointed by act of Parliament,) with a sum that had been transferred, (taking it to have been improperly transferred,) out of one cause into another cause.

A question arose, whether supposing that the Court of Exchequer had jurisdiction to charge him by that species of summary process, there lay any appeal to this House. With the assistance of my noble and learned friend\* who sits near me, a great deal of consideration has been given to this case; there can be no doubt, I apprehend, that if a cause had existed on the Equity side of the Court of Exchequer, the Court of Exchequer had jurisdiction to decide that case, and that an appeal would lie to your Lordships; but on the other hand, if the Court of Exchequer in Ireland had a summary jurisdiction to charge the Accountant-General, as one of its officers, for misconduct in the nature of negligence, it becomes then a serious question indeed, whether this House has jurisdiction in such a case. At present I may say there is no precedent: I may venture in the presence of my noble friend to say we both doubt, whether the Court of Exchequer in Ireland had jurisdiction to proceed in this summary way; and it has, therefore, appeared to us most advisable to submit to your Lordships this proposition, that the

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cause should stand over, with liberty in the mean time, (notwithstanding the appeal,) to Mr. O'Neill the Appellant, to apply to the Court of Exchequer for a revision of the order on the question of jurisdiction, leaving it open, whether, if they have jurisdiction, they have duly exercised it. If they should be of opinion that they have jurisdiction, it will be for your Lordships to dispose of this appeal, after it has so stood over; in which case you must determine, whether you have jurisdiction or not. If on the other hand, they should be of opinion on reviewing that case that they have no jurisdiction, the consequence of that will be, that in the form of a cause which may be originally decided in the Court of Exchequer in Ireland, it may be brought here by regular appeal. I therefore, propose that the cause should stand over till the next Session of Parliament, and that in the mean time Mr. O'Neill should be at liberty to apply to the Court of Exchequer for a reversal of the order appealed from, for the purpose of discussing the question of the jurisdiction of the Court to make an order in the nature of this order in a summary way. After that application shall have been made, and the judgment of the Court of Exchequer shall have been pronounced upon that application, then that this matter should further come on in this House, any of the parties then being at liberty to apply as they shall be advised.

*Lord Redesdale.*—It appears to me impossible, considering the subject, that your Lordships can entertain jurisdiction of this case in the manner in which you have already entertained jurisdiction on appeals, for there is in truth no record

before you. It is a question whether an officer of the Court of Exchequer has executed his duty so negligently, that he has made himself responsible to suitors in the Court to answer to them in damages for the injury they have sustained, and whether by his being so made responsible, he is to relieve the Bank of Ireland from being responsible. It appears to me that that is properly the subject matter of a distinct suit, and that there ought to be before your Lordships, some record upon which you can proceed. The proceeding which has been had is not a matter of record, it is not incidental to the record, but it is, in my humble judgment, a complete distinct new cause of action. If such action can be sustained, a distinct new cause of action, which ought to be made the subject of a distinct and separate suit, it might then probably come before your Lordships in the way of appeal; but in the manner in which it is framed I apprehend your Lordships can no more take notice of it by way of appeal, than if the Court of Exchequer had proceeded against any officer for misconduct in his office, either by removing him from that office, if they had a right so to do, or by proceeding against him in the way of contempt by process of contempt, for having so conducted himself.

These are proceedings, from which I apprehend no appeal can be allowed to your Lordships' House; because they are matters incidental to the Court, for the sake of keeping the officers in proper order in the execution of their duties in the Court; but this is a distinct question of property, which ought, therefore, to have been made the subject of a distinct suit, and not the sub-

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ject of such an order. It does not appear that the Court of Exchequer entered into any consideration of that subject; it does not appear to have been a case properly before them. The Court of Exchequer, therefore, not having considered that question, the proper way appears to be to refer the matter again to the Court; if they conceive that they have jurisdiction, they will state the grounds on which they conceive they have that jurisdiction, and then your Lordships will know how to deal with it, but it is a matter which cannot properly be on record in the Court of Exchequer. In the manner in which it is brought forward, I do not apprehend it can be the subject of appeal. In a distinct suit, the question will properly arise, whether this gentleman was responsible for the misconduct of an under clerk of his office, and whether the Bank of Ireland are to be relieved in the manner in which this order relieves them, it being at least extremely questionable, whether there was not as much of misconduct in the Bank of Ireland as in this gentleman.

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Die Lunæ, 4th July, 1825.

On hearing the said petition of appeal, a question having been made, whether the Court of Exchequer in Ireland had jurisdiction in a summary proceeding, to make the order appealed from; and it not appearing that that question had been fully considered in the said Court, let this matter stand over, with liberty for the Appellant, notwithstanding the appeal before this House, to apply to the said Court to discharge the order complained of, to the intent that the question whether the said Court had jurisdiction to proceed in a summary way to make such order, may be further considered by the said Court.

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In consequence of the above order, the Appellant in 1827 moved the Court of Exchequer in Ireland that the order of 1820 might be reconsidered and discharged. The motion was many times before the Court; but in December 1827, the Court of Exchequer refused to make any further order. Upon this motion, the creditors, the original applicants, were served with notice, but did not appear; the Bank of Ireland were not served but did appear, and opposed the motion.

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In 1829, the case came again before the House of Lords for further consideration, when Counsel again appeared for the Bank of Ireland; but Fitzgerald, at whose instance the order complained of was originally made, purposely abstained from appearing.

On the 6th of April, 1829, the order was reversed without observation, the Counsel of the Bank of Ireland consenting to take 100*l.* for costs.

### Order Reversed.

For the Appellant Mr. Sugden and Mr. Bligh; for the Respondent, the Bank of Ireland, Mr. Horne and Mr. Philimore.

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## ENGLAND.

(COURT OF EXCHEQUER.)

THOMAS SPONG        -        -        -        *Appellant.*  
JOHN SPONG, and others.        -        *Respondents.*

J. S., by a will properly executed, gave a sum of 4000*l.* to be laid out in Government or real securities, in trust for L. the wife of S., for her separate use for her life; remainder to J. for his life; remainder to the children of L. by S. He then devised certain lands and tenements specified to various persons named in the will, and after bequeathing several pecuniary legacies, he concluded thus:—"And I do hereby expressly charge and make liable my real and personal estate to and with the payments of the aforesaid several legacies." Held, reversing the decree of the Court below, that the lands specifically devised, were not liable to the payment of the legacies on a deficiency of the personal estate.



**JOHN SPONG**, by his will, dated the 20th of August, 1814, bequeathed and devised as follows:—

I give and bequeath unto my dear wife, Rosamond Spong, the sum of 200*l.* of lawful money of Great Britain, and direct the same to be paid into her hands immediately after my decease; also, I give and devise unto my said wife the possession of the dwelling house in which I now reside, and also the cottage adjoining, now in the occupation of Andrew Kemsley, with the outbuildings, garden, and appurtenances thereunto belonging, free from all rent, except

government and parochial taxes, so long as she continues my widow, sole and unmarried ; also, I give and bequeath unto my said wife, all my furniture and wines, and moveables of every description, not consisting of money or securities for money, in and about my said dwelling house and cottage, outbuildings, garden and premises, for and during her natural life, she continuing my widow, sole and unmarried. And after the decease of my said wife, or her marrying again, which shall first happen, I give, devise and bequeath my said dwelling house, cottage, outbuildings, garden and premises, and my said furniture, and all wines which shall not be previously used by my said wife, together with my moveables of every description, not consisting of money or securities for money, in and about the said premises, unto and to the use of my son Thomas Spong, his heirs, executors, administrators and assigns, for ever.

Also, I give and bequeath unto my said wife and her assigns, for and during the term of her natural life, one annuity or yearly rent-charge or sum of 400*l.* of lawful money of Great Britain, free and clear of and from all taxes and deductions, whether parliamentary or otherwise (except property tax), the said annuity to be chargeable and charged on, and issuing and payable out of the lands hereinafter mentioned, (that is to say) the yearly sum of 300*l.* part thereof, to be chargeable and charged on and issuing and payable out of the lands by this my will hereinafter given and devised unto my said son Thomas Spong, now living at Mill-hall ; and the yearly sum of 100*l.*

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the remaining part of the said yearly rent-charge of 400*l.* to be chargeable and charged on and issuing and payable out of my mill and premises at Snodland, hereinafter by this my will given and devised unto my son William Spong, &c. And I order and direct that the several provisions made for my wife by this my will, shall be by her accepted and taken in lieu and stead and in full satisfaction of all dower and thirds, free bench and customary right, which she as my said wife could claim to be entitled of, in, to or out of all or any part of my estates, &c.

Also, I give and bequeath to my executor hereinafter named, the legacy or sum of 4,000*l.* of like lawful money current in Great Britain and Ireland, to be by him laid out and invested in his name, in the public stocks or funds, or upon government or real securities; and the stocks, funds and securities in or upon which the said sum of 4,000*l.* shall be laid out and invested, I direct shall and may be from time to time altered, varied and disposed of, and the monies arising therefrom again laid out and invested in or upon new or other stocks, funds and securities, and so often as to him my said executor shall seem meet; upon trust, that he my said executor do and shall pay the dividends and interest thereof from time to time when and as the same shall accrue due and payable for and during the natural life of Letitia the wife of John Spong, late of the Borough of Southwark, hop factor, during such time only as she remains a widow and unmarried, in such manner as she the said Letitia the wife of the said John Spong, notwithstanding her coverture,

shall by any note or writing direct or appoint, or into her own proper hands for her own separate and peculiar use and benefit, so as not to be subject to the debts or control of her husband the said John Spong; and in like manner in all respects as the said annuity or yearly rent-charge of 100%. is hereinafter made payable to my daughter Rosamond, and only upon the receipt or receipts of the said Letitia Spong, or her appointee or appointees, which alone shall be a good and sufficient release and discharge, releases and discharges, to my said executor for so much of the dividends, interest and produce of the stocks, funds and securities in or upon which the said sum of 4,000%. shall be invested and laid out, as shall be therein expressed to be received.

And from and immediately after the decease of the said Letitia Spong, I give and bequeath the interest and dividends of the said sum of 4,000%. unto my executor hereinafter named, upon trust that he do and shall from time to time well and truly pay or cause to be paid the said interest and dividends into the proper hands of the said John Spong, for and during the term of his natural life; and it is my express will and meaning, that the same shall continue and be paid and payable to the said John Spong during so many years only of his life, as he the said John Spong shall not alien, sell, or assign the same, or attempt to alien, sell or assign the same, to any person or persons whatsoever: but if the said John Spong shall sell or assign the same, then and in such case the said bequest and the trusts hereby created and declared of and con-

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cerning the same shall cease, determine, and be utterly void, and the same shall go to and be paid and payable to the said John Spong's children by the said Letitia his wife as hereinafter mentioned; and it is my express mind, will and meaning, that the receipt of the said John Spong shall alone be a sufficient discharge to my said executor. And from and immediately after the decease of the said Letitia Spong and the said John Spong her husband, then I give and bequeath the said principal sum of 4,000*l.* upon trust that he my said executor do and shall pay and apply the said principal sum of 4,000*l.* for the benefit of all and every the child or children of the said Letitia Spong by the said John Spong her husband, to be equally divided, &c. Provided always, that in case all the said children shall happen to die before any of them attain the age of twenty-one years, and without leaving lawful issue as aforesaid, then upon trust that the principal sum of 4,000*l.* shall sink into and be deemed and taken as part of the residuum of my personal estate.

Also I give and devise unto my son Thomas Spong, his heirs and assigns, all and every my freehold and leasehold estates, situate at Mill-hall, East Malling, Aylesford, Burham, Ditton, and Sandgate, in the said County of Kent, and Acton in the County of Middlesex, comprising the estate called the Dunkin Estate, together with the mansion-house, thereunto belonging; and also those three dwelling houses in the occupation of John Smitherman, John French, and John Jarratt, together with the barn, called Ashbarn, lodges and yard; and also all those

four other dwelling houses in the occupation of E Oakley, &c.; and also all those two acres and a half of land planted with apples and cherries, leading from Mill-hall to the London turnpike road; and also a field, called Old Hithe Field, containing about one acre and a half; and also certain lands at New Hythe, called Simmons, together with the dwelling-houses, &c.; and also all those two houses next adjoining, late in the occupation of, &c. with the lodges, gardens, and appurtenances thereunto belonging; and also all that estate which I lately purchased of Mr. Richard Round, containing by estimation about eighteen acres, together with the willow plot adjoining and next Baldock's wharf; and also all that estate which I lately purchased of Sir John Honeywood, Baronet, likewise adjoining, containing about ten acres (be the same more or less); and also all those two plots of land near the Brook-gate, allotted by the commissioners for dividing the waste lands of East Malling, together with the appurtenances, to hold the said estate and premises by this my will devised to my said son Thomas Spong, unto and to the use of my said son Thomas Spong, his heirs and assigns for ever, subject to the annual payment of 300*l.* to my said wife, during her life, part of the said yearly sum of 400*l.* by this my will given to her; and the annuity or yearly sum of 100*l.* hereinafter given in trust for my daughter Rosamond Spong.

Also I give and bequeath to my said son Thomas Spong, all the farming stock, goods and chattels, books, debts and things contained in an inventory lately made out by me, and signed with my

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name, which my said son Thomas Spong is in possession of.

Also I give and devise unto my said executor hereinafter named, all that my messuage or dwelling-house, barn and outbuildings, and also twenty acres of land, (be the same more or less) situate lying and being at Cow Lease, in the parishes of Aylesford and Burham aforesaid, late in the occupation of Rebecca Underhill, her under tenants or assigns, but now in my own occupation, with the appurtenances thereunto belonging, upon the trust and to and for the several uses intents and purposes hereinafter mentioned; that is to say, upon trust, that he my said executor shall and do from and immediately after my decease, permit and suffer my son Daniel Spong, and his assigns, to have, hold and enjoy all that my said freehold estate to my said executor given in trust as aforesaid, and to receive and take to his and their own use and benefit the rents, issues and profits thereof, for and during the term of his natural life, he my said son Daniel keeping the said freehold premises in good and tenantable repair.

And from and immediately after his decease, I give and bequeath the said freehold messuage or dwelling-house, barns and outbuildings, with the lands and appurtenances thereunto belonging, unto my said executors, until the youngest child of my said son Daniel shall attain his or her age of twenty-one years; and in the meantime to receive the rents, issues and profits of the same, for and towards the maintenance, education, and bringing up of all and every the child and children of my said son Daniel Spong, upon the

trust hereinafter mentioned; and when and so soon as such child shall have attained the said age of twenty-one years, then I do hereby direct my said executor to sell and absolutely dispose of the same by public auction or private contract, as to him shall seem expedient, for the best price or prices in money that can be reasonably had or obtained for the same, and to convey the same accordingly, &c. And from and immediately after the decease of my said son Daniel upon trust, that he my said executor, do and shall pay or transfer all such principal monies, stocks, funds and securities, so to arise by sale of my said estate, unto all and every the child or children of the said Daniel Spong, lawfully to be begotten, equally to be divided between or among them, share and share alike, if there shall be more than one; and if there shall be but one such child, the whole to be paid or transferred to such one child, &c.

But in case all the said children shall happen to die without leaving lawful issue of his, her or their body or bodies as aforesaid, then I give and devise the said last mentioned messuage or tenement, lands, hereditaments and premises, unto and to the use of my said son Thomas Spong, his heirs and assigns for ever, &c.

Also I give and devise Snodland Mill, and the several cottages attached thereto, and also the drying-houses, sheds, and wharf, and about nine acres of land thereunto belonging, unto and to the use of my son William Spong, of Snodland, his heirs and assigns, for ever, subject and charged with the annual payment of 100*l.* to my said wife for her life, part of the

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said yearly sum of 400*l.* by this my Will given to her.

And I give, devise and bequeath unto my executor hereinafter named and his heirs, during the natural life of my daughter Rosamond Spong, spinster, one annuity, yearly rent-charge, or annual sum of 100*l.* of lawful money of Great Britain, to be issuing and payable out of the estates and premises devised to my said son Thomas Spong as aforesaid.

Also I give and bequeath to my executor hereinafter named, the sum of £1,000. of lawful money of Great Britain, to be by him laid out and invested in his name in the public stocks or funds, or upon government or real securities; and the stocks, funds and securities in or upon which the said sum of 1,000*l.* shall be laid out and invested, I direct shall and may be from time to time altered, varied, sold and disposed of, and the monies arising thereupon again laid out and invested in or upon new or other stocks, funds and securities, and so often as to him my said executor shall seem meet, upon trust, that he my said executor do and shall pay the interest and dividends thereof, from time to time, as the same shall accrue due and payable, for and during the natural life of my said daughter Rosamond Spong, in such manner as she shall by note or writing direct or appoint; or into her own proper hands, for her own separate and peculiar use and benefit, so as not to be subject to the debts or control of any husband she may have; and in like manner, in all respects, as the said annuity or yearly rent-charge of 100*l.* is hereinbefore directed to be

paid to her my said daughter Rosamond Spøng, and only upon the receipt or receipts of my said daughter, or her appointee or appointees.

And from and immediately after the decease of my said daughter, upon trust, that he my said executor do and shall transfer and assign the stocks, funds and securities, in or upon which the said sum of 1,000*l*. shall be laid out and invested, unto between and among all and every the child and children of my said daughter, by any husband she may happen to have, &c. ; and in case my said daughter Rosamond Spøng should not happen to have any son who shall live to attain the age of twenty-one years, nor any daughter who shall live to attain that age, or be married, then upon trust that he my said executor do and shall transfer and assign the stocks, funds and securities in or upon which the said sum of 1,000*l*. shall be laid out and invested unto, between and among all and every, or any one exclusively of the others or other of my sons and other daughters, as my said daughter, (whether covert or sole) shall by her last will and testament in writing or writings, purporting to be or in the nature of her last will and testament, or a codicil or codicils thereto, to be by her respectively signed and published in the presence of and attested by two or more credible witnesses, direct or appoint; and in case my said daughter Rosamond Spøng should happen to depart this life intestate, as to the whole or any part of the said stocks, funds and securities, then the said sum of 1,000*l*. shall sink into and be deemed and taken as part and parcel of the residue of my personal estate.

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Also I give and bequeath to my daughter Mary, the wife of Charles Brenchley, Esq. the legacy or sum of 2,000*l.* of lawful money of Great Britain, which will make up her fortune to the amount of 3,000*l.* I having on the marriage of my said daughter Mary with the said Charles Brenchley given her the sum of 1,000*l.*

Also I give and bequeath to my executor hereinafter named, the legacy or sum of 2,000*l.*, &c. upon trust, that he my said executor do and shall pay the dividends and interests thereof from time to time, when and as the same shall accrue due and payable, for and during the natural life of my daughter Martha, the wife of Major William Rowan, in such manner as she shall appoint, &c.; and from and immediately after the decease of my said daughter Martha, then upon trust, that my said executor do and shall stand possessed of the said last mentioned stocks, funds and securities, upon such and the same trusts, and subject to the same provisos and directions in all respects, for the benefit of all and every the children, or the only child, as the case may be, of my said daughter by her present husband, or by any other husband she may hereafter happen to have, as herein before expressed, of and concerning the stocks, funds and securities in or upon which the said sum of 2,000*l.* shall be laid out and invested for the benefit of all and every the children or the only child of my said daughter Martha, &c. Also I give and bequeath unto my said daughter Martha Rowan, the further sum of 1,000*l.* of lawful money current in Great Britain and Ireland, to be paid and payable to her executors

administrators and assigns, within twelve months next after my decease.

Also I give and bequeath to the two children of my deceased daughter Elizabeth, the wife of William Bowles, Esq. the legacy or sum of 1,000*l.* each, of like lawful money, when they shall respectively attain the age of twenty-one years; also I give and bequeath unto John Spong, the son of the said John Spong by Letitia his wife, the sum of 500*l.* of like lawful money current in Great Britain and Ireland, to be paid him when he shall attain his age of twenty-one years.

And I order and direct the several legacies and sums by this my will given and bequeathed, or which I may hereafter give or bequeath by any codicil or codicils to this my will, and which shall not be otherwise directed to be paid, to be raised and paid, or put out and invested, as the case may require, within twelve months next after my decease; and I do hereby expressly charge and make liable my real and personal estate, to and with the payments of the aforesaid several legacies, &c. The Appellant was appointed executor of this will.

The will was executed and attested so as to pass real estates. The Testator died in the month of January, 1815, without having revoked or altered his will, leaving the Respondent Daniel Spong, his eldest son and heir at law, and Daniel Spong and the Appellant Thomas Spong, and the Respondent William Spong his co-heirs in gavelkind.

After the death of the Testator the Appellant proved his will, and possessed himself of the per-

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sonal estate and effects of the Testator, and he paid the principal part of the debts and some of the legacies of the Testator; but he did not pay the whole of a mortgage debt which was charged upon the estate devised to the Respondent William Spong, nor the legacy of 4,000*l.* to the Respondents John Spong and Letitia his wife and their children, nor invest any sum for the benefit of the several persons entitled to such legacy, and the legacy of 2,000*l.* by the Will given to the Respondent Martha Rowan and her children, remained unpaid. Upon the death of the Testator, the Appellant and the other devisees named in his Will, respectively entered into the possession of the several estates thereby devised to them respectively.

The Respondents John Spong and Letitia his wife and their children, together with the Respondent Charles Peneranda da Franchimont, who married one of the daughters of John Spong, on the 13th of December, 1824, filed their bill in the Court of Exchequer against the Appellant, and the bill was afterwards, amended by making the Respondents Daniel Spong, William Spong, Rosamond Spong, William Rowan and Martha his wife, and William Bowles and Mary Bowles Defendants to the suit. The case stated upon the amended bill, was to the effect before mentioned. The bill prayed that an account might be taken of what was due and owing to the above mentioned Respondents for principal, in respect of the aforesaid legacy of 4,000*l.* and also of the interest which had accrued due upon such legacy, and that such interest might be paid by the Appellant to the Respondent Letitia

Spong, for her sole and separate use, and that the Appellant might be directed forthwith to pay into the Bank of England, in the name and with the privity of the Accountant-General of the said Court, in trust in the said cause, the sum of 4,000*l.* and that the same when paid in, might be invested by the said Accountant-General, in the purchase of three per cent. Bank Annuities, for the benefit of the above named Respondents, according to their respective interests therein, under the said Testator's said will, and that the trusts thereof might be declared accordingly; and that the Appellant might also be decreed to make good to the above named Respondents such loss as they had sustained, by the non-investment by him of the said sum of 4,000*l.* at the time when he ought to have invested the same; and that an account might be taken also of what was due to the Respondent John Spong the younger, for principal and interest in respect of the legacy therein mentioned; and in case the Appellant would not admit assets of the said Testator come to his hands, sufficient for the purposes aforesaid, then that an account might be taken of the personal estate and effects of the said Testator, which had been received by the Appellant, or by his order, or for his use; and that the same might be applied in a due course of administration; and in case the personal estate of the Testator should not be sufficient for the purposes aforesaid, then that such deficiency might be made good by the sale of a competent part of the real estates of the Testator, and that all necessary parties might join in such sale; and that in the mean time a Receiver might be ap-

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pointed of the rents, issues and profits of the real estates of the Testator; and that such Receiver might be directed out of such rents and profits to keep down the interest then due, and thereafter to accrue due upon the legacy; and that the Appellant, and the other Defendants therein named, might be restrained by injunction from interfering, or in any manner intermeddling with such real estates.

The Appellant, upon being served with process, put in his answer to the original bill, and also his answer to the amended bill, and thereby admitted the will of the Testator as stated in the bill, and his death; and that he the Appellant had duly proved the will, and had taken upon himself the execution thereof, and that he had possessed himself of the personal estate and effects of the Testator, to the amount thereinafter stated, but he thereby denied, that the estate of the Testator was nearly sufficient to pay all the debts and legacies of the Testator; and the Appellant, by his answer, admitted that he had entered into and then was in possession of the real estates of the Testator, devised to him by the will.

The other Defendants also put in their respective answers to the bill, and the Respondents Daniel Spong and William Spong, by their answers respectively admitted the will and death of the Testator; and the Respondent William Spong, by his answer further stated, that the premises devised to him by the Testator, were mortgaged by the Testator in his life time to John Simson, Senior, of Hertford, in the County of Hertford, hatter, for the purpose of securing the payment to John

Simson, of the sum of £2,200. or thereabouts, with interest; and that the Defendant had, since the death of the Testator, paid or accounted for the sum of 1,100*l.* or thereabouts, on account of such mortgage, out of the Defendant's own proper monies; and he submitted, that the sum secured by such mortgage being a debt of the Testator, the sum of 1,100*l.* so paid by the Defendant on account of such mortgage, ought to be repaid to him, with interest, out of the estate of the Testator.

The several answers of the Appellant, and of the other Defendants to the suit, were replied to: and a witness having been examined on the part of the Respondents, the Plaintiffs in the suit, and cross examined on the part of the Appellant, the cause came on to be heard\* before the Lord Chief Baron, and was argued on the 19th and 20th of December, 1826, and on the 29th of January, 1827, when it was decreed that the will should be established, and the trusts thereof carried into execution; and it was referred to one of the Masters of the Court, to take an account of the respective values of the several real estates of which the Testator was seised at the time of making his will and of his death; and to take an account of the debts, legacies, and funeral and testamentary expenses, and of the personal estate of the Testator come to the hands of the Appellant, &c. and how the same had been disposed of; and upon taking such accounts, if it should appear that the personal estate of the Testator was not sufficient for the payment of the legacy, then the Court declared,

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\* Reported I Young and Jervis, 300.

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that the Testator had, by his will, charged so much as should remain unsatisfied upon the whole of the real estates, whether specifically devised or otherwise, and also upon his personal estate specifically bequeathed: And it was further ordered, that Rosamond Spong, the widow of the Testator, should be at liberty to elect, whether she would claim her dower out of the real estates of the Testator, or whether she would take under the will of the Testator John Spong; and that the Master should enquire and report to the Court accordingly; and whether the Respondent William Spong had paid off any mortgage made by the Testator on any of his real estates, &c.

From this decree, except so far as it directs, that Rosamond Spong, the widow, should be at liberty to elect whether she would claim her dower out of the real estate of the Testator, or whether she would take under his will, the appeal was presented.

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For the Appellants—*Mr. Fonblanque* and *Mr. Swann*.

For the Respondents—*Mr. Sugden* and *Mr. Stuart*.

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On the part of the Appellant it was argued that by the general rule of equity, a specific devise was exempt from contribution to a general pecuniary legacy, and that it was for the Respondents to shew from the words or provisions of the will, a clear intention on the part of the Testator to charge the land specifically devised, with the payment of the legacy; that if the land was so charged, *a fortiori*, the specific legacies to the brother and the widow must be equally

charged, which seemed inconsistent with the apparent intent of the Testator, particularly as to the widow, whose legacy was given as a substitute for the right of dower; that the judgment below was founded on the propositions that every devise of land was specific, therefore the devise of a residue of real property was specific, and that there was no distinction as to exemption from charge, between a devise of a particular estate and of such residue: which propositions were contrary to law and the authority of decided cases.

For the Respondents, it was put upon the ground of an implied intention to be collected from the will: And that the words of the will charge all the lands without exception, and are not confined to the residue.

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The authorities cited were *Sayer v. Sayer*, 2 Vern. 688. *Prec. in Chanc.* 392. *Lewin v. Lewin*, 2 Ves. 417. *Webb v. Webb*, 2 Vern. 111. *Brown v. Allen*, 1 Vern. 31. *Long v. Short*, 1 P. W. 403. *Hamby v. Roberts*, Ambler, 128. S. C. 1 Dickens, 104, under the name of *Hamley v. Fisher*. *Birmingham v. Kirwan*, 2 Scho. and Lef. 414. *Howe v. L. Darlington*, 7 Ves. 147: for the Dict. of Eldon, C., that every devise of land is specific. *Hill v. Cock*, 1 Ves. and Bea. 175, for the same dictum. *Clifton v. Burt*, 1 P. W. 679. *Harris v. Ingledew*, 3 P. W. 91. *Kightley v. Kightley*, 2 Ves. J. 328. *Keeling v. Brown*, 5 Ves. 359. *Joy v. Campbell*,\* 1 S. and L. 328. *Powell v. Robins*, 7 Ves. 209. *Ellison v. Airey*, 2 Ves. 568. *Haslewood v. Pope*, 3 P. W. 322. *Aldrich v. Cooper*, 8 Ves. 396. *Austen v. Halsey*, 6 Ves. 475.

\* See a corrected and enlarged report of this case, post, p. 110.

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*Lord Manners.*—This is an appeal from a decree of the Court of Exchequer in England, on a bill by the Respondents, who are pecuniary legatees of a sum of 4,000*l.* under the will of John Spong, for the payment of this legacy and for the usual accounts. The bill prayed that if the personal estate of the Testator should be insufficient, the deficiency should be raised out of his real estates, and the question between the parties is, whether if the personal estate should be insufficient to satisfy this legacy, the legatees interested in this sum have a right to resort to the property specifically devised and bequeathed to supply the deficiency. The Lord Chief Baron was of opinion, that according to the true construction and effect of the Testator's will the pecuniary legatees had such right, and decreed accordingly. The Appellant Thomas Spong, who is a specific devisee and legatee, and is also residuary devisee and executor, has appealed from that part of the decree.

The Testator by his will, upon which the question arises, gave a legacy of 200*l.* to his wife, and he also gave to her the possession of a dwelling house, in which he resided, so long as she continued his widow, sole and unmarried. He gave to her also all his furniture and wines, and moveables of every description, not consisting of money, or securities for money, in and about his dwelling house, during her natural life, she continuing unmarried; and after her decease, or her marrying again, he gave his dwelling house, cottage, furniture, and wines which should not have been used, together with moveables of every description, and not consisting of money, or securities for money,

to the use of his son Thomas Spong. He then gave to his wife an annuity of 400*l.*, 300*l.* of it being payable out of the lands given and devised to his son Thomas Spong, and the remaining 100*l.* out of a Mill and premises devised to another son, William Spong. He then directed that the several provisions made by his will should be in lieu of dower: and he released his son John Spong from a bond debt of 1000*l.* He then gave to his executor a sum of 4000*l.* which is the sum now in question, to be invested in his name in government securities, upon trust, to pay the dividends and interest to Letitia Spong, the wife of John Spong, for her separate use during her widowhood, with remainder to her son as provided by the will. He then gave his estates, freehold and leasehold, at Mill Hall and other places in the County of Kent, and also a property in the County of Middlesex, to Thomas Spong the Appellant, his heirs and assigns for ever, subject to the annual payment of 300*l.* to his wife during her life, part of the said yearly sum of 400*l.* by his will given to her; and the annuity or yearly sum of 100*l.* thereafter given in trust for his daughter Rosamond Spong. He then gave to his son, Thomas Spong all the farming stock, &c. upon his farm. He then gave certain lands in the parishes of Aylesford and Burham, to his Executor in trust for his son Daniel Spong, for his life, and after his decease to his children. He then gave certain lands, cottages, and appurtenances to his son William Spong, subject to an annuity of 100*l.*, the remainder of the sum of 400*l.* given to his widow.

He gave several other pecuniary legacies, and

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then comes this clause upon which the question arises: "I do hereby expressly charge and make " liable my real and personal estate to and with " the payment of the aforesaid several legacies." He then gave some direction with respect to his pews in Aylesford Church; and as to all the rest, residue and remainder of his real and personal estate, of what nature or kind soever the said might consist, not theretofore given and bequeathed, he gave and devised it to his son Thomas Spong, his heirs, executors, administrators, and assigns absolutely, and he appointed Thomas Spong his executor.

Upon the hearing of this cause the Lord Chief Baron pronounced a decree to this effect:—"That the Will should be established, and the " trusts thereof performed and carried into execution"; and it was further ordered and decreed " that it should be referred to the Master to take " an account of the respective values of the " several real estates of which the said testator " was seised at the time of making his will, and " the time of his death"; and it was further ordered and decreed " that it should be referred " to the Master to take an account of the debts, " legacies and funeral and testamentary expenses, " and of the personal estate of the testator John " Spong, come to the hands of the appellant, his " executor, or of any other person or persons by " his order or for his use, and how the same and " every part thereof had been applied and disposed " of; and upon taking such accounts if it should " appear that the personal estate of the testator " was not sufficient for the payment of the said " legacy, then the Court declared that the testator John Spong had by his will charged so

“ much as should remain unsatisfied upon the  
 “ whole of his real estates, whether specifically  
 “ devised or otherwise, and also upon his personal  
 “ estate specifically bequeathed.”

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It appears that there was some real property of the testator which passed under the residuary devise, and in this case, Thomas Spong the specific devisee under the will has appealed from that part of the decree which makes liable to the satisfaction of the pecuniary legacy the property devised by the will.

Upon the report of the case it seems that the Lord Chief Baron has laid down a proposition which appears to have pervaded the whole of his argument, and to have governed his decision, and which is to this effect, namely, that there is no difference between a specific devise of a particular estate, and a residuary devise of a real estate, and that a general charge of pecuniary legacies upon real estate as it would affect a residuary devise so it would affect a property specifically devised: for as to real estates they are in their nature specific devises, and if a legatee has a right to resort to the one he has equally a right to resort to the other. Upon this proposition the whole case rests. Now, I confess, I cannot concur in this proposition. There is not much authority in the books upon the subject, but, I think there is a marked and obvious distinction between property specifically devised and real estate which passes under a residuary clause.

In the first case a testator by specifically devising or specifically bequeathing any part of his property, intends as between the objects of his bounty to separate that part of his property from the rest, and that it should not be subject to the



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provisions and operation of his will. Whereas in a residuary devise as in the present case, it is quite the reverse. The devisee must take it subject to all the provisions and incumbrances charged upon the land. In the one case the devisee takes the specific thing devised—in the other case the residuary devisee takes such part of the real property as shall remain after satisfying the charges and incumbrances affecting the real estate. The cases therefore appear to me most materially different. By the general rule a specific devisee or specific legatee shall not contribute to make good a pecuniary legacy, but there can be no such rule applicable to a residue. A residue of a real estate is so far specific that it must be in the possession or in the power of the testator to devise it at the time of making his will, and upon the lapse of any specific devise it will not fall into the residue, but in other respects it is merely residue, and this is its character. Lord Hardwicke in the case of *Hamby v. Roberts*, which is reported in Ambler, and better reported in the first volume of Dickens's Reports, recognizes that distinction in the marshalling of assets; and it is a distinction, as it appears to me, which is very obvious and very decisive of this case. The Lord Chief Baron has not drawn that distinction, and this appears to me to be the objection to this part of the decree against which the appeal was directed.

Mr. Sugden in his argument contended that if the testator had at the outset of his will charged his debts and legacies upon his real estate, and had then given specific devises, and specific bequests, and also pecuniary legacies, the pecuniary legatees would, in case other funds were deficient,

have a right to resort to the property specifically disposed of. I do not concur in that opinion. It certainly was not the opinion of Lord Alvanley, who in three different instances stated his opinion as to the distinction between creditors and legatees under such circumstances. In the first case of *Kightley v. Kightley*\* in 1794, Lord Alvanley makes that distinction. Afterwards in the case of *Shallcross v. Finden*† in 1795, he persists in that distinction, and in the case of *Keeling v. Brown*,‡ in the year 1800, he continues to distinguish between creditors and legatees in respect of such a charge.

Now this opinion of Lord Alvanley's, though it does not amount to the authority of a decision upon the subject, is by no means without weight. He laid down this rule in the first case I have adverted to, and having afterwards understood that the Lord Chancellor differed from him in opinion, that brought his mind more forcibly to reflect upon it, and he persisted in that opinion, and afterwards proceeded in three different cases to lay down the doctrine accordingly. I think there is much more weight to be given to it than to a mere *obiter dictum*, for though it does not amount to a decision, it was a deliberate and well considered opinion.

When this case came on for argument, I stated that I would not in the absence of any law Lord take upon myself to reverse the decision of an eminent Judge, whose decisions are entitled to so much respect. I have now an opportunity of expressing my opinion in the presence of my noble and learned Friend on the woolsack; and I have the satisfaction of saying that I have com-

\* 2 Ves. J. 328. † 3 Ves. 739. ‡ 5 Ves. 359.

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municated that opinion to Lord Eldon, and Lord Redesdale, both of whom concur with me in it.

With respect to the case of *Campbell v. Joy*, which was supposed to be a decision upon the point; in that case there does not appear to be an express charge so as to amount completely and entirely to an authority upon the point; but I have enquired of Lord Redesdale what we are to understand by his stating in that case "that it " would be understood by counsel that it would " be contrary to principle to charge a specific part " of an estate called Throne, with the payment of " legacies." His answer was, that what he meant by its being against principle was, that it was an established rule of the Court that a specific devisee or a specific legatee was not to contribute to make up a pecuniary legacy; and that that was what he meant to lay down in that case.

Now if the testator had intended to prefer the pecuniary legatee to the specific devisee or specific legatee, and had by his will expressed that intention, or if that intention must be necessarily implied from the context of the will, there is no doubt the Court would have given effect to that intention and have decided accordingly. But the rule of construction when this intention is not expressed, is that the pecuniary legatee cannot resort to property that is specifically disposed of. That was the opinion of Lord Eldon in this case, and it was the opinion also of Lord Redesdale, in which I perfectly concur, having had the advantage of hearing all the arguments upon the subject.

There was another observation which was very well made by one of the Counsel at the Bar, that

in this case the testator seems to have himself understood the distinction between a specific legatee and a residuary legatee, for he gives to Thomas Spong a specific bequest of land and personal property, and he also makes him residuary devisee, and legatee, and from that it was inferred that he was aware of the difference between a specific and a residuary devise of real estate. That was an observation made by one of the Learned Counsel, and very properly as applying to this case; so far, therefore, from there being any intention in this case on the part of the Testator to prefer the pecuniary legatee, he has himself drawn the distinction, and he has stated nothing that would justify the Court in excepting this case out of the general rule, namely, that a specific legatee or a specific devisee shall not make good a pecuniary legacy. If this distinction of the Lord Chief Baron's were to stand, it would very much disturb and shake that rule, which I think there is no ground for doing.

With respect to the case put by Mr. Sugden, although I may say, that I do not agree with him, and that I think Lord Alvanley was not of that opinion, perhaps the best and most satisfactory answer that I can give to Mr. Sugden is, that the Testator in this case has not so done as he represents. He says, that if in the outset of the will there was a charge of legacies, upon real and personal estate, it would entitle the residuary legatee to go against the property so devised. But in this case the Testator has not so done.

Upon the whole, I submit to your Lordships, that the part of the decree of the Lord Chief Baron, in which he directs that "if it shall ap-

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“pear that the personal estate of the Testator  
“was not sufficient for the payment of the said  
“legacy, then the Court declared that the Testator  
“John Spong had by his will charged so much as  
“should remain unsatisfied, upon the whole of his  
“real estates, whether specifically devised or  
“otherwise, and also upon his personal estate  
“specifically devised,” should be reversed, and  
that in all other respects the decree should be  
affirmed.

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Die Lunæ, 13th of April, 1829.

It is ordered and adjudged &c. that so much of the decree complained of in the said appeal as declares that “if upon taking the accounts, it should appear that the personal estate of the Testator was not sufficient for the payment of the legacy in the decree mentioned, then that the said Testator J. Spong had by his will charged so much as should remain unsatisfied, upon the whole of his real estates, whether specifically devised or otherwise, and upon his personal estate specifically bequeathed, be and the same is hereby reversed.” And it is further ordered and adjudged that the said decree complained of, in all other respects be and the same is hereby affirmed.

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In the report of the case of *Joy v. Campbell*, 1 Scho. and Lefroy, p. 339, is a marginal note or abstract, which is thus expressed:—“A specific legacy cannot in a subsequent part of the will be charged with payment of debts or legacies.” The Lord Chief Baron, in his observations (1 *Young and Jervis*, 314) in giving judgment upon this case of *Spong v. Spong*, having expressed a doubt of the accuracy of this marginal note, a corrected report of the case of *Joy v. Campbell*, drawn up by Mr. Beatty, is inserted below. This report contains many essential additions to the statements, some of which are noticed by italics, and others by indexes. A report is also added of the further proceedings in the case before Lord Manners.

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WILLIAM BROWN deceased, was in and before the year 1787 a dormant partner in the mercantile house at Belfast called the "Sugar House Company," in which he possessed one half of six shares part of twenty shares of which the capital stock consisted, the other half of which six shares belonged to John Brown his brother; William Brown was also a dormant partner, and had one third of a share of the capital stock in another mercantile establishment called the "Rope Walk Company," in which John and another brother Thomas Brown were concerned in the same manner, and to the same extent, each having one third of a share.

In 1787, John Brown being about to commence business as a banker, assigned his interest in the said two mercantile concerns to his brother William in trust for himself, and William executed a declaration of trust accordingly; and shortly after William intending to enter into another banking house, prevailed on Thomas (who was apprized of the former trust), to become a trustee both for him and for John, for their respective shares in the said houses, the other partners having agreed to accept Thomas as a partner. An assignment was executed to him, for merely nominal consideration, the object being to evade the provision of the bankers' act; and soon after the execution of the assignment, Thomas cancelled the deed by cutting off the name and seal of William, and delivered back the deed so cancelled to William in whose possession it remained till his death. Thomas regularly received the dividends accruing from the said companies, and duly paid over to William his shares during his life, and gave credit to John in his account with him for the amount of his shares. During the period of these transactions Thomas carried on a distinct trade in partnership with John Oakman, under the firm of Brown and Oakman.

William Brown was, previous to the making of his will after mentioned, and at the time of his death seized and possessed of a farm and land called the Throne near Belfast, in the county of Antrim, for the lives of the King and the Dukes of York and Clarence, and from the death of the survivor for the term of forty-one years, to be computed from the 1st November, 1790, and also seized and possessed of other real and personal estates to a very considerable amount, and being thus seized and possessed, he, on the 4th November, 1794, made his will duly executed, by which he bequeathed several pecuniary legacies and an annuity, and devised and bequeathed to his brother Thomas Brown, his dwelling-house in Belfast, held for lives and years, with his household furniture, plate, houses, &c. and

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after bequeathing several further pecuniary legacies, and among others one thousand pounds to William Brown Joy, the son of his niece Mary Ann Joy, and two thousand pounds to the other issue of said Mary Ann Joy; he left devised and bequeathed his farm and premises at the Throne, in the Barony of Belfast, with his buildings, &c. thereon unto his nephew William Brown, son of his brother Thomas Brown, to hold to him his heirs, executors, administrators and assigns, from the time he attained his age of twenty-one years; but in case his said nephew William Brown should die under the age of twenty-one years, he left and devised the said farm and premises to the next eldest son which his said brother Thomas Brown might happen to have, when such next eldest son should attain the age of twenty-one years, and to the heirs, executors, administrators, or assigns of such next eldest son: and in case no son of his said brother Thomas should attain the age of twenty-one years, then he left and devised the farm at the Throne amongst the daughters of his said brother Thomas (if more than one) share and share alike, with this special limitation however respecting the said devise of the farm at the Throne, to wit that none of the said devises should or could take effect, until the decease of his said brother Thomas, for it was his will, and he did thereby order and direct, that his brother Thomas Brown should have and enjoy the free use and benefit, profits, and advantages of the said farm, from testator's decease for the term of his natural life without impeachment of waste. The testator then bequeathed three thousand pounds among the children of his said brother Thomas Brown to be paid with interest on their coming of age or sooner at the option of his executors, *and subject to the payment of the legacies, annuities, devises and bequests aforesaid, and to his debts and funeral expences*; he devised and bequeathed all the rest residue and remainder of his lands, tenements, freehold estates, effects, money, and securities for money, goods, chattels, and worldly property of every denomination and description whatsoever and wheresoever at the time of his death, unto his said brother Thomas Brown his heirs, executors, administrators, and assigns, and nominated John Campbell, (to whom he gave a legacy of one hundred pounds), James Joy, and his brother Thomas Brown executors and trustees of his will, and the testator thereby ordered and directed that whatever part of the several legacies thereinbefore mentioned should remain unpaid, at the end of twelve months next after his decease, together with the life annuity thereinbefore mentioned, should be then *well and sufficiently secured upon his freehold and personal estates and assets, and bear a legal interest from that time until paid and discharged in manner aforesaid*. And in case any of the legacies thereinbefore

mentioned and bequeathed should lapse, by means of the death or failure of one or more of the legatees aforesaid previous to testator's death, he thereby bequeathed such lapse the legacy or legacies to his said brother Thomas Brown his executors, administrators, or assigns, and upon the death or failure of one or more of the legatees aforesaid or annuitant before-mentioned, whose legacies were payable under said will upon contingencies of life, of attaining full age, or being otherwise, circumstantially or eventually, capable of taking or inheriting under the said will, he did thereby order and direct that all such contingent legacies should go and belong to his said brother Thomas Brown his executors, administrators, and assigns.

William Brown the testator died in December, 1795, whereupon all the executors proved his will in the prerogative court of Ireland, and took probate, but as James Joy did not live at Belfast where the property principally lay, it was managed by the others; Thomas Brown continuing until his bankruptcy in October 1798, to receive the dividends of the Sugar House and Rope Walk companies as trustee, collecting debts due to the deceased and paying some of his debts and legacies, and Campbell (who had been the partner of William in the bank) retaining in his hands a sum of five thousand two hundred and eighty-five pounds one shilling and fivepence belonging to his testator, which was lying in the bank at the time of his death, and paying himself his legacy of one hundred pounds.

With respect to this sum of five thousand two hundred and eighty-five pounds one shilling and fivepence the following transactions took place. Campbell had in the life time of William Brown lent a sum of four thousand two hundred pounds to Brown and Oakman on the joint note of William and John Brown, and Brown and Oakman for two thousand seven hundred pounds, of this, part was paid in William Brown's life time, and the remainder due at his death the sum of three thousand two hundred and thirty-two pounds, which Campbell received from the bank, and lodged the notes in the bank to the credit of William Brown's account; soon after the bank settled accounts with Thomas Brown as executor of William Brown, on which occasion, after deducting the said sum of three thousand two hundred and thirty-two pounds, and also a sum of one thousand five hundred and forty pounds which had been previously paid to Thomas Brown, a balance of five hundred and thirteen pounds one shilling and fivepence appeared due to the estate of William Brown which was then paid to him, and a receipt for the whole sum of five thousand two hundred and eighty-five pounds one shilling and fivepence was given to the bank by Campbell and Thomas Brown as executors; at

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the same time, the notes not only of William Brown but of John Brown and of Brown and Oakman were given up to Thomas Brown, and no steps were ever taken to compel payment against either John Brown or Brown and Oakman.

After the bankruptcy of Brown and Oakman, (which did not take place until October 1798) the assignees insisted on their right to have not only Thomas's original share in the Rope Walk company, but also that which he held in trust for William, which trust he had admitted on his examination before the commissioners, and this claim having been disputed by the executors of William, was submitted to arbitrators, who by their award decided in favour of the assignees, in consequence of which, the value of that share was paid over to them by the company.

On the bankruptcy of Thomas Brown, John Graham and John Scott were chosen his assignees, who as such, sold the interest of the bankrupt in the freehold tenement in Waring Street, Belfast, which had been specifically devised by William Brown to him for the sum of one thousand two hundred pounds, and they also sold the life interest of Thomas Brown in the farm at the Throne, which had been specifically devised to him for life.

Thomas Brown died on the 2nd of July, 1801, leaving Sarah, Isabella, William, Frances, Mary, and Campbell Brown, his only children, but before his son William, or any of his children, had attained the age of twenty-one years.

The bill in this cause was filed on the 14th of January, 1803, by the children of Mary Anne Joy against Campbell and Joy, the surviving executors of William Brown, and the assignees and children of Thomas Brown, and against John Brown the eldest brother and heir at law of William Brown the testator, stating the foregoing circumstances, and charging that owing to the misapplication of the assets by Thomas Brown and Campbell, there was not a sufficiency left for payment of the legacies bequeathed to them by the will of William Brown, and praying, "That the said award may be set aside, and that the executors might be decreed to come to a just and fair account with your supplicants for the estate of the said William Brown, and that the said executors might set forth a particular account of the real and personal estate of the testator, specifying the nature, quantities, qualities, and value thereof respectively, and how much thereof they had applied in discharge of the testator's proper debts and legacies and funeral expences, and how much thereof had been applied in discharge of the debts of the said Thomas Brown, and of said Brown and Oakman, and to whom, and for what paid,

and what was become thereof particularly; and that the said John Campbell might answer for such parts of testator's estate as he misapplied in payment of said notes, or as through his neglect or wilful default had been wasted and lost, or as by his means or assistance had come to the hands of said Thomas Brown, or that said Thomas Brown might contribute to the payment of said notes: And that the said executors might set forth a particular account of the debts due and owing by the testator at the time of his death, and on what securities, and to whom due, and how contracted, and which of them remained unsatisfied, and which of them had been paid, and by whom: and that *the whole real and personal* estate whereof the said William Brown died seized or possessed, or such part thereof as to the Court should seem fit, might be decreed to be subject to the said William Brown's debts and legacies; and that the same or a competent part thereof, might be sold for payment of said debts and legacies, or that plaintiffs might be permitted to claim as creditors on the estate of said Thomas Brown for the amount thereof, or for said William Brown's proportion of the purchase money thereof specified in said deed of assignment to said Thomas Brown; and that plaintiffs, or said executors in trust for them, might be permitted to claim as creditors on said bankrupt's estate, for all sums of money received by him before his bankruptcy out of said two companies, on the foot of said William Brown's shares therein; and that the said John Graham and John Scott might be restrained by injunction from making a dividend of said bankrupt's estate, until the hearing of the cause. And that plaintiff's legacies might be raised, and might be placed out at interest on good security for their benefit, until such legacies should respectively be payable; and that in the meantime the interest thereof might be applied towards their maintenance and education, and that all necessary accounts might be taken.

All the defendants answered the bill; and witnesses having been examined, the cause came on for hearing on pleadings and proofs, and was argued on the 1st, 2nd, 4th, 5th, and 12th days of May, 1804, before Lord Redesdale, the then Lord Chancellor of Ireland.

The Attorney-General (O'Grady), now Chief Baron, Mr. Sauria, Mr. Mayne, and Mr. Joy for the plaintiffs; the Solicitor-General (Plunkett), now Chief Justice Common Pleas, Mr. Burston, and Mr. Scriven, for the defendants, John Campbell and William Brown, and the other children (all minors) of Thomas Brown; Mr. Dunn, and Mr. Bushe (now Chief Justice King's Bench), for defendant Joy; and Mr. Ball and Mr. Bell for the assignees of Mr. Brown.

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Much of the argument of Counsel was directed, to the consideration of the validity of the award, made regarding the shares held by Thomas Brown in the two companies, in trust for William the testator, and also as to the liability of Campbell to refund to the estate the sum he had received in payment of the notes in which the testator was security to him with Thomas Brown, and Brown and Oakman. It was also argued by the plaintiffs' Counsel, that the assignees of Thomas Brown were bound to bring into Court the proceeds of the sales of the tenement in Waring Street, and the life interest of Thomas in the farm at the Throne, both of which he took under the specific devises of the will. With regard to the farm at the Throne, on the part of the plaintiffs it was contended, that the devise of the Throne to William Brown was a contingent remainder, and that by the death of Thomas Brown before his son William came of age the remainder to William, and the other limitations expectant thereon were defeated, and the same therefore descended to testator's heir at law, or to his residuary legatees, and were in either case subject to the debts and legacies of the testator. *However, it was argued that even taking it for granted that the property passed to William the minor under the specific devise in the testator's will, it was equally liable with the other real property to the payment of his debts and legacies.*

On the part of the minor, William Brown, it was argued that the devise of the interest of William Brown which was a *per auter vie* estate, and a term of years in case the lives should fall within a certain period to William Brown the minor at 21, though given by a written clause to Thomas the father for life, could not be considered as a contingent remainder, which must take effect, or not at all, on the death of Thomas, as in the case of a particular estate supporting a remainder of an estate of inheritance for the *per auter vie* estate remains and continues whilst the life lasts, and if there be no special occupant, it goes to, and vests in the first occupant, and that the devise therefore was no more than an appointment of the person to take as special occupant, and though he may not, and it was admitted, was not entitled to take as such until he was 21, it was contended that his use then would be good, and no rule of law to prevent him, and that the devise was clearly a good existing devise, and that the doctrine of contingent remainders was quite inapplicable. This point being established, *it was admitted that the possession or profits of the lands from the death of Thomas Brown to whom it was specifically devised only for life until William Brown should attain the age of twenty-one years, passed under the residuary devise to the assign-*

*nees of Thomas Brown, subject with the rest of testator's property not specifically devised to the payment of his debts and legacies; but that only till William, the specific devisee, should attain his full age, and that after that period they would belong to him, not subject to the charge made by the will for the payment of the debts and legacies, notwithstanding the testator's other properties should be inadequate to pay his debts and legacies, as it was submitted that the said charge did not affect the interest to which William was entitled under the said specific devise.*

With respect to this property his Lordship had the question fully discussed at the bar, "whether William Brown, the son of Thomas, took the estate devised to him by way of contingent remainder or of executory devise," but it afterwards appeared unnecessary to decide the question at that stage of the cause.

*Lord Redesdale.* I shall consider further the point with respect to Campbell and the Throne property, the only other question is with respect to the shares in the partnership concerns.

His Lordship then went into the consideration of the arguments which had been urged on the part of the assignees of Thomas Brown as to the validity of the award made with respect to these shares, and stated the reasons at great length which induced him to come to the conclusion, that "with respect to this property the right was with the creditors and legatees, and that there was no difficulty in saying that this money should be accounted for." His Lordship then went on to say,—

"On the other part of the case,\* the funds for paying these demands, are only the property passing under the *residuary* bequest after the *specific* bequest to Thomas Brown," (that is, the specific bequest of the tenement in Waring Street, and of a life interest in the Throne.) "It is attempted in the subsequent part of the will to charge this, but that is against principle; it is a legacy as much as any other, and it cannot be considered that the testator meant to give that specifically, and yet to subject it in some manner as if it formed part of the residue; that property therefore, must be taken by the assignees of Brown, not subject to the legacies so far as the other fund shall not be able to discharge them."

The Lord Chancellor was disposed to reserve his judgment as to

\* The assignees' liability to refund the produce of the sales of the tenement in Waring Street, and the life interest of Thomas in the Throne, both specifically devised to him, his Lordship having reserved the consideration of the devise to William the minor of the Throne property for further consideration.

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the liability of John Campbell to refund to the testator's estate the sum he had received from the testator's assets in payment of the notes of the testator and Thomas Brown, and Brown and Oakman; and also the absolute disposition of the fee in the Throne property until the report should come in; but it having been intimated as the wish of the parties to have his Lordship's opinion as to the liability of Campbell delivered in the first instance, the cause was called on again on the 12th of May, 1804, and his Lordship after alluding to the arguments of Counsel on both sides, and referring to several decisions on similar points, declared that Campbell was bound to refund the sum he had so received from the assets of the testator.

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Pursuant to that part of the decree by which it was ordered, that the estate and property of William Brown not specifically devised then remaining unsold should be forthwith sold, the testator's interest in several premises were sold by the executors, and amongst the rest, the rents of the farm of the Throne to accrue until a son of Thomas Brown should attain the age of twenty-one years, were sold for the sum of fifty pounds, the Chancellor considering that the *intermediate* rents between the death of Thomas Brown, and the majority of William Brown, his son, passed under the *residuary* devise and were subject to the testator's debts and legacies.

John Campbell having died, a bill of revivor was filed against his executors, and the cause was revived.

Graham and Scott, the assignees of Thomas Brown, both died, the former having survived.

William Brown, the eldest son of Thomas Brown, attained his age of twenty-one years on the 30th of April, 1810.

The Master made his report in 1811. On the 22nd February, 1812, the cause was heard on the Master's Report and on the merits.

The Attorney-General for the plaintiffs, after stating the pleadings, decree, and Master's Report, proceeded: "A question arises on the freehold premises called the Throne, belonging to the testator, who after bequeathing several legacies, devised the farm of the Throne to his nephew William Brown, to hold to him, his heirs, executors, administrators, and assigns, from the time he attained the age of twenty-one years; but in case he should die under that age, he devised the farm to the next eldest son which his brother might happen to have, when such next eldest son should attain the age of twenty-one years, and to the heirs, &c. of such next eldest son, and in case of no son attaining twenty-one years, to the daughters. This question is reserved by Lord Redesdale in the decree, and it now becomes neces-

nary to consider who is entitled under the will to this farm. We contend that it is a devise to testator's brother for life, with a contingent remainder to his first son attaining twenty-one, and not an executory devise; that Thomas having died before any son attained twenty-one, the contingent remainder is gone, and the estate descends to the heirs. There was another question, whether this farm was liable to the payment of the pecuniary legacies, but *Lord Redesdale decided that those lands being specifically devised to Thomas Brown for life, and to his first son attaining twenty-one, were not liable to the payment of the legacies.*

Mr. Dunn for the defendant, William Brown, the devisee.

The object of the testator was to put forward in life the family of his brother Thomas. His brother John was his heir at law, but the testator does not notice him in the will. The testator had fixed his residence at the Throne, and his anxious wish appears to have been to establish Thomas's family there. He intended that Thomas should enjoy the farm during his life, and on his death the devise over to take effect. The intent is clear and manifest, but it is contended that this being a contingent remainder, has been destroyed. We contend that this limitation to William, the son of Thomas, is a vested interest. I argue this as if it were an estate of inheritance, but it is an estate *per autre vie*, in which there cannot be strictly a legal remainder. The first case where a devise to a person at twenty-one was held to be a vested remainder, was *Boraston's case*, 3 Rep. 19. *Edwards v. Hammond*; or *Stocker v. Edwards*. There was a devise for life, remainder to another when he should attain twenty-one. The tenant for life died and the remainder man was only seventeen, and the question was whether the remainder vested: the Court held it to be a condition subsequent, and that the estate vested immediately, subject to be divested on not attaining twenty-one. See *Mansfield v. Dugard*, 2 Eq. Ca. 195; *Stocker v. Edwards*, 2 Shower, 398; 3 Lev. 152.

*Lord Manners.* If the words in the will were to Thomas for life, remainder to his eldest son on attaining twenty-one, I should go with you; but the devise is to William Brown from the time he should attain twenty-one years.

*Mr. Dunn.* The word "If" is the strongest that can be used to create a contingency; and yet even that has been overruled. *Bromfield v. Crowder*, 1 N. R. 313. There the testator devised to A. for life, and after her death to B. for life, and at the decease of A. and B. or the survivor, gave all his real estate to C. if he should attain twenty-one. It was held C. took a vested remainder. In the pre-

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sent case the word "from" is used in the first devise; and in the second devise the word "when" is used, which shews the intention. The last limitation is to the daughters. The testator must be presumed to have intended an equal benefit to all the children. Now the devise to the daughters is without any condition, and if their father died without leaving sons, they would take absolutely. This proves the intention of the testator was that all should take alike. In *Bromfield v. Crowder*, it was contended the remainder was gone, yet the Court was unanimous in the opinion that the estate had vested; and there is no distinction between the present case and that, where the devise was held to be an immediate devise, but to go over in case of death before twenty-one.

*Lord Manners.* When I find that Sir William Grant, who had so much experience, sent that case to a Court of Law, I ought not to decide the present question, which is purely legal; however, I shall hear the argument.

The Solicitor-General on the same side.

We contend that this is an executory devise, although I may argue differently from the course pursued by Mr. Dunn, yet we have the same interest. If the father had no estate for life, it would be clearly an executory devise to the eldest son, and would vest. This estate was intended to vest in possession when any of the nephews attained twenty-one, till then the father of the devisees was to enjoy as a rent-charger; then does any inconsistency arise by giving the father an estate for life? It is only a condition subsequent, that if the first nephew should die before twenty-one, his father living, the second nephew should take; but if he died after twenty-one, then the estate would go to his representatives. The attaining twenty-one is the period looked at by the testator, and when one of the nephews should attain it, the estate would then vest. The father was an incumbrancer for the rents and profits. Suppose the testator had devised an annual sum to the father, or that the sons should pay the rents and profits to him, would that make any difference? 2ndly, Here the words of the will are transposed in order to make out a contingent remainder,—it is not the rule of construction thus to defeat the will.

Mr. Plunkett for the legatees.

Lord Redesdale has decided that this is not a vested interest, and then the question is, whether it be a contingent remainder or an executory devise.

Mr. Burston for the legatees.

From the decision of *Doe v. Morgan*, 3 T. R. 763, it is manifest that this is not an executory devise, it must be either a vested or

contingent remainder,—whether the testator intended it should be one or the other, is never attended to. Here is an estate for life to Thomas, remainder to his first son attaining twenty-one, remainder to the daughters. As some of the sons have attained twenty-one, the daughters cannot take; here the condition is, if any of the sons attain twenty-one at the death of the father: a remainder may be limited of an estate *per autre vie*, and a freehold estate must support it.

*The Lord Chancellor.* I must direct a case to be made for the opinion of a Court of law on the following question: Whether any of the children of Thomas Brown, in the events which have happened, took any and what interest under the will of William Brown, in the lands called the Throne farm.

On the 21st of May, 1812, the case was argued in the Court of Common Pleas, upon nearly the same grounds which had been urged before the Lord Chancellor: The following certificate was afterwards sent by the Judges to the Lord Chancellor.

“We are of opinion, that in the events which have happened, the defendant William Brown took upon the death of his father, Thomas Brown, the whole interest in the term of lives and years in the lands called the Throne farm, under the will of the said William Brown, subject to be divested, if the said William Brown, the defendant, had died before he attained the age of twenty-one years.”

On the 13th of May, 1813, the cause was heard on the Judge's certificate, and also on the question specially reported by the Master, whether the executors of Campbell should be charged with interest on the sum of three thousand two hundred and thirty-two pounds, part of a sum of five thousand two hundred and eighty-five pounds, applied by Campbell, in paying the debts due to Thomas Brown and John Oakham; when the Lord Chancellor was of opinion that the certificate of the Judges of the Court of Common Pleas should be affirmed, and that the executors of Campbell should be charged interest, and the following decree was made.

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*Court.* Decree the defendant, William Brown, entitled to the farm called the Throne in the pleadings mentioned, devised to him by the will of the late William Brown deceased. Decree the defendants, the executors of John Campbell, deceased, chargeable with the several sums of three hundred and eighteen pounds six shillings and twopence, and three thousand seven hundred and twenty pounds fourteen shillings and tenpence, being the interest reported due by

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them on the sum of three thousand seven hundred and eighty-five pounds one shilling and fivepence, unapplied by Thomas Brown in said report named out of the sum received by him from the discount company in the pleadings mentioned, together with interest on said sum of three thousand seven hundred and eighty-five pounds one shilling and fivepence, from the 20th day of January, 1811, to which day interest was so reported thereon until paid, and let said several sums be forthwith paid by said defendants to the plaintiff, William Brown Joy, as administrator, *De bonis non*, with the will annexed of said William Brown deceased, and after payment thereof of plaintiff's costs, refer it to the Master to apportion said several sums so to be paid the plaintiff, William Brown Joy, amongst the several legatees of said William Brown according to the sums reported to them, and the sums paid them on foot of their respective legacies, and let the several sums so to be apportioned be paid by the plaintiff, William Brown Joy, to the several persons entitled thereto out of the fund so to be apportioned and paid to him as aforesaid. Refer it to the Master to apportion the stock transferred to the credit of the plaintiffs, Isabella Joy, Robert Joy, and George Joy, minors, pursuant to the said order of the 9th day of May, 1812, together with such interest as hath accrued thereon, to and amongst the said Isabella Joy, Robert Joy, and George Joy, minors, and let the Accountant-General then forthwith draw in favour of and transfer to the said Isabella, Robert, and George Joy, respectively, on their attaining their respective ages of twenty-one years, so much of said stock and the interest thereof as shall be so apportioned to them respectively, either party, plaintiffs or defendants, to be at liberty to proceed on said references. Reserve the question of costs as against the assignees of Thomas Brown, and the creditors of John Campbell.

JOHN DALY,  
*Depy. Regr.*

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## ENGLAND.

(GREAT SESSIONS, CHESTER, AND KING'S BENCH)  
(IN ERROR.)

EDWARD VIGOR FOX, Esq. - - - *Plaintiff.*  
GEORGE HENRY, Bishop of Chester *Defendant.*

By the stat. 31 Eliz. c. 6, s. 5, it is enacted, that " If any  
" person, &c. shall, for any sum of money, reward, gift,  
" profit, or benefit, directly, or indirectly, or for or by reason  
" of any promise, agreement, grant, bond, or other assurance  
" of, or for any sum of money, reward, gift, profit, or benefit  
" whatsoever, directly or indirectly, present or collate any  
" person to any benefice with cure of souls, dignity, prebend,  
" or living ecclesiastical, or give or bestow the same for or in  
" respect of any such corrupt cause or consideration, that  
" every such presentation, collation, gift and bestowing, and  
" every admission, institution, investiture, and induction  
" thereupon shall be utterly void, frustrate, and of none  
" effect in law."

In *quare impedit* it was found, by special verdict that B. the incumbent of a rectory was on a certain day afflicted with a mortal disease of which he died at eleven o'clock at night, and that at three o'clock in the afternoon of the same day T. the patron of the living, and F. both knowing the condition of B. in pursuance of an agreement, executed a deed by which in consideration of 6000*l.* T. granted to F. the advowson for a term of 99 years, if F. should so long live, with a proviso that as soon as F. by vacancy or otherwise should have made presentation to the Rectory, he should re-assign to T. the residue of the term. It was found also by the verdict that this agreement and deed was a device to convey the next presentation: But that the deed was executed without the knowledge or privity of H. (the person afterwards presented by T. and rejected by the Bishop Ordinary), and without any intention to present him.

Upon this finding, judgments having been given for the Defendant in the Courts of Great Sessions, Chester, and the King's

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Bench, they were reversed in the House of Lords upon writ of Error, the House being of opinion that this sale of the next presentation was not void under the statute.

**T**HIS was a Writ of Error, brought by the plaintiff below, from a judgment of the Court of King's Bench at Westminster, affirming a judgment of the Court of great Sessions at Chester, on a special verdict in a *quare impedit* commenced in the latter Court.

In the declaration in the Court below, the first count stated that the advowson of the rectory of the church of Wilmslow was appurtenant to the manor of Bollyn, and set out specially the title of Thomas Joseph Trafford to the manor, with the appurtenances for life; and shewed that J. Bradshaw, the last incumbent, was presented by virtue of a grant of the next avoidance made by Trafford, through whom Thomas Joseph Trafford claimed; and then proceeded: "And  
" the said Thomas Joseph Trafford being so  
" seised thereof afterwards, to wit, on the 12th  
" day of November 1819, at, &c. (the said church  
" being then and there full of the said J. Brad-  
" shaw, the then incumbent thereof,) by a cer-  
" tain indenture then and there made, between  
" Thomas Joseph Trafford of the one part, and  
" plaintiff of the other part, of which profert is  
" made, he the said Thomas Joseph Trafford, for  
" the consideration therein mentioned, did grant,  
" bargain, sell, and demise unto the plaintiff, his  
" executors, &c. All that the said advowson,  
" donation, right of patronage, presentation, and  
" free disposition of, in, and to the said Rectory  
" and Parish Church of Wilmslow in the County

“ Palatine of Chester, with the rights, members,  
 “ and appurtenances thereunto belonging, *habendum* to the said plaintiff, his executors, &c. for  
 “ ninety-nine years, if the said Thomas Joseph  
 “ Trafford should so long live.” By virtue of  
 which said last mentioned indenture, the said  
 plaintiff, then and there became and was possessed  
 of the said advowson, of and in the said Rectory,  
 as in gross by itself for the said term, so to him  
 thereof granted. The declaration then averred  
 that Thomas Joseph Trafford is still living, and  
 that after the making of the indenture, and whilst  
 plaintiff was possessed of the advowson, to wit,  
 on, &c. the said church became vacant by the  
 death of the said J. Bradshaw, the last incumbent  
 thereof, whereby it then belonged and now be-  
 longs to the plaintiff to present a fit person to  
 the said church so being vacant; but the said  
 Bishop unjustly hinders him from so doing.

There was a second count, setting out a title to  
 the advowson in gross, and omitting all mention  
 of the manor; in all other respects it was similar  
 to the first.

The defendant cravedoyer of the indenture  
 made between the plaintiff and Trafford, whereby  
 it was witnessed, that in consideration of 6,000*l.*,  
 paid to Trafford by the plaintiff, the former had  
 granted, bargained, sold, and demised, and by the  
 said indenture did grant, &c., all that the ad-  
 vowson, donation, right of patronage, presenta-  
 tion, and free disposition of, in, and to the Rectory  
 and parish Church of Wilmslow, with the rights,  
 members, and appurtenances thereunto belong-  
 ing, *habendum*, for ninety-nine years, if Trafford  
 should so long live: With a proviso that when

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and so soon as he the said Edward Vigor Fox, his executors, &c. should have presented to the said Rectory or Church of Wilmslow, by reason of the same having become vacant or void by the death, resignation, deprivation, eviction, promotion, or succession of J. Bradshaw the incumbent, or otherwise, or through the wilful neglect or default of him the said Edward Vigor Fox, his executors, &c., the said Rectory or Church should have been suffered, as to the presentation or right of presentation thereto to lapse, he the said Edward Vigor Fox, his executors, &c. should and would at any time or times thereafter at the request and proper costs and charges of the said Thomas Joseph Trafford, or such person as he should appoint, reassign the said advowson to him the said Thomas Joseph Trafford, or such person as aforesaid, for all the residue which should be then unexpired of the said term of ninety-nine years, free from all incumbrances, by the said Edward Vigor Fox, his executors, &c. He then craved oyer of the indenture in the second count mentioned, which was declared to be in the same words as the indenture in the first count, and therefore not set out on the record.

He then pleaded several pleas:

1st. That the said Thomas Joseph Trafford did not grant, bargain, sell, and demise unto the said plaintiff, his executors, &c. the said advowson, &c. in the first count of the declaration mentioned in manner and form, &c.

2d. A similar plea to the second count.

3d. The third plea which was pleaded to both counts, traversed the grant, &c. unto the plaintiff, his executors, &c.

4th. The fourth plea to both counts averred that the said Church of Wilmslow is within the Diocese of Chester, and a benefice with cure of souls, and that whilst the said Thomas Joseph Trafford was so seised of the said manor and of the said advowson, and before the making of the corrupt, simoniacal and unlawful agreement in this plea aftermentioned, to wit, on the 11th day of November, in the year of our Lord 1819, the said J. Bradshaw then being the incumbent of and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, whereof, as well the said Edward Vigor Fox and Thomas Joseph Trafford as one George Uppleby, clerk, in that plea aftermentioned, to wit, on, &c.; and also at the time of making the corrupt, simoniacal, and unlawful agreement in that plea aftermentioned, there had notice: and the said Bishop further says, that whilst the said Thomas Joseph Trafford was so seized of the said manor to which, &c. with the appurtenances, &c. and of the said advowson as aforesaid, and whilst the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid, was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on, &c. at &c. they the said Thomas Joseph Trafford, Edward Vigor Fox, and George Uppleby, and each of them, then and there, well knowing the premises and believing and expecting that the death of the said J. Bradshaw of the mortal disease aforesaid, was then and there fast approaching, and that, by means of the death of the said J. Bradshaw, the said church would forthwith become vacant, it was in such belief and

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1819, at, &c. the said Edward Vigor Fox, under colour, and by pretence and means of the said last-mentioned indenture so made as aforesaid, in pursuance of the said corrupt, simoniacal, and unlawful agreement, did corruptly simoniacally, and unlawfully, and against the form of the statute in such case made and provided, present the said George Uppleby, clerk, to the said Bishop, to be admitted, instituted, and inducted into the said Church of Wilmslow, to wit, at, &c. And the plea insists, that by reason of the premises, and by force of the statute in such case made and provided, the said presentation of the said George Uppleby by the said Edward Vigor Fox, so made as aforesaid, became, and was, and is utterly void, frustrate, and of no effect in law.

5th. The fifth plea was like the fourth, omitting the parts in *italics*.

6th. The sixth plea varied from the fourth only by omitting to state the privity of Uppleby.

7th. The seventh plea varied from the fifth in the same manner.

8th. The eighth plea alleged that the said Church of Wilmslow, is within Defendant's diocese of Chester, and a benefice with cure of souls; and that whilst the said T. J. Trafford was so seised of the said manor and advowson, and before the making of the corrupt, simoniacal, and unlawful agreement in this plea after mentioned, to wit, on the 11th of November, 1819, the said J. Bradshaw, then being the incumbent of, and filling the said Church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, to wit, at, &c. whereof the said

E. V. Fox and T. J. Trafford, to wit, on, &c. and also at the time of making the corrupt, simoniacal, and unlawful agreement in this plea after mentioned, there had notice; and that whilst the said J. Bradshaw, so being the incumbent, and filling the said church as aforesaid, was so afflicted, and in such danger, state and condition as aforesaid, to wit, on, &c. at, &c. they the said T. J. Trafford and E. V. Fox, and each of them, then and there well knowing the premises, and believing and expecting that the death of the said J. Bradshaw, of the mortal disease aforesaid, was then and there fast approaching, and that by means of the death of the said J. Bradshaw, the said church would forthwith become vacant, it was in such belief and expectation corruptly, simoniacally and unlawfully and against the force of the statute in such case made and provided, agreed by and between the said T. J. Trafford and the said E. V. Fox, that in consideration of a large sum of money, to wit, the sum of 6,000*l.* to be therefore paid by the said E. V. Fox to the said T. J. Trafford, the said indenture in the said first count of the said declaration mentioned, to have been made between the said T. J. Trafford and the said E. V. Fox, should be made, and that the said T. J. Trafford should seal, and, as his act and deed, deliver the said indenture. And the plea states, that afterwards and whilst the said J. Bradshaw, so being incumbent of, and filling the said Church as aforesaid was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on the 12th day of November, in the year of our Lord, 1819, at, &c. in pursuance, furtherance, and per-

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formance of the said corrupt, simoniacal, and unlawful agreement, the said indenture, in the said first count of the said declaration mentioned to have been made between the said T. J. Trafford and the said E. V. Fox was made; and the said T. J. Trafford did seal, and, as his act and deed, deliver the said indenture.

9th. The ninth plea, after stating the illness of the incumbent, and that the Plaintiff and Trafford had notice of it, alleged the corrupt and simoniacal agreement to have been, that Trafford should, “in consideration of money, grant, bargain, and “sell to the Plaintiff the next presentation to “the said church;” and averred that the indenture in the declaration mentioned, was made in pursuance of that agreement, and concluded as the eighth plea.

10th. The tenth plea, after the same introduction, alleged that Plaintiff and Trafford well knowing the premises, and believing and expecting that the death of the said J. Bradshaw of the mortal disease aforesaid was fast approaching, and that by means of his death, the said church would forthwith become vacant, and the said Plaintiff intending to present the said George Uppleby to be admitted, instituted, and inducted into the said church at Wilmslow, when the same should, by the death of Bradshaw, next become vacant; it was then and there corruptly, &c. agreed between Trafford and the Plaintiff, that the Plaintiff should pay to Trafford 6,000*l.* and that he, in consideration thereof, should grant, &c. to the Plaintiff the next presentation to the said church, the said Plaintiff then and there intending to present the said G. Uppleby. The

plea then alleged, that in pursuance of that agreement, and in order to make such bargain and sale of the next presentation, the indenture in the declaration mentioned was executed by Trafford, and that the Plaintiff accepted and received it with intent to present Uppleby, and concluded as the former pleas.

11th. The eleventh plea, after the same introductory matter as in the ninth, alleged that it was corruptly, &c. agreed between the Plaintiff and Trafford "that the indenture mentioned in "the declaration should be made, and that it was "made in pursuance of that agreement."

12th. The twelfth plea varied from the eleventh only, by omitting to allege that the Plaintiff and Trafford knew of the incumbent's dangerous illness.

13th. The thirteenth plea, after the averment of identity, without mentioning Bradshaw, alleged that whilst Trafford was seised of the manor and advowson, it was corruptly, &c. agreed between him and the Plaintiff, that the indenture in the declaration mentioned should be made, and that it was made and executed in pursuance of that agreement.

14th. The fourteenth plea, after the same introduction, stated, that whilst Trafford was seised of the manor and advowson, and before the making of the said simoniacal and corrupt agreement in this plea after-mentioned, to wit, on, &c. and after the death of the said Bradshaw, the said last incumbent of the said church, and after the church became vacant by the death of Bradshaw, and whilst it remained and was vacant, to wit, on, &c. it was corruptly, &c. agreed by and

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between Trafford and the Plaintiff, that Trafford should, in consideration of 6,000*l.* to be paid by the Plaintiff to him, grant, bargain, and sell to the Plaintiff the next presentation to the said church, and that the indenture before mentioned was made and executed in pursuance of that agreement.

15th. The fifteenth plea was similar to the fourteenth, except as to the corrupt agreement, which it alleged to be that the indenture in the declaration mentioned, should be made; and averred that it was made and executed in pursuance of that agreement.

The replication to the third plea took issue on the traverse of a grant. To the fourth, that it was not corruptly, &c. agreed by and between the Plaintiff and Trafford, with the knowledge of Uppleby, as in that plea alleged. A similar replication to the fifth plea: and to each of the other pleas, the replication denied that it was corruptly, &c. agreed as in those pleas alleged.

The jury found a special verdict; first, they found the identity of the several matters alleged in the two counts of the declaration, as averred in the pleas; and then that before and on the 12th day of November, in the year of our Lord, 1819, the said Thomas Joseph Trafford was seised of the manor and advowson within-mentioned, and that before and on the said 12th day of November, in the said year of our Lord 1819, the within-named Joseph Bradshaw was the incumbent of the within-named church, in the pleadings within-mentioned: And that the said church was then full of the said Joseph Bradshaw, to wit, at the parish of Wilmslow within-men-

tioned, in the county of Chester within-mentioned; and that the said Joseph Bradshaw, so then being such incumbent of, and filling the said church as aforesaid, was, before and upon the said 12th day of November, in the said year of our Lord 1819, afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then greatly despaired of; and that he was and continued so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until the time of his death: and that the said Joseph Bradshaw so being such incumbent as aforesaid, died of the said mortal disease, on the said 12th day of November, in the said year of our Lord 1819, at half-past eleven o'clock at night of the same 12th day of November, to wit, at the parish aforesaid, in the county aforesaid: And that on the said 12th day of November, in the said year of our Lord, 1819, at ten minutes before three o'clock in the afternoon of the same day, and whilst the said Joseph Bradshaw was such incumbent as aforesaid, an agreement was made and concluded between the said Thomas Joseph Trafford, so being seised of the said manor and advowson as aforesaid, and the said Edward Vigor Fox for the sale, by the said Thomas Joseph Trafford to the said Edward Vigor Fox, of the next turn or presentation of the said church, for and in consideration of six thousand pounds of lawful money of Great Britain; that on the said 12th day of November, in the said year of our Lord 1819, and immediately after the making of such agreement, they, the said Thomas Joseph Traf-

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ford and Edward Vigor Fox, in pursuance of such agreement, and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within-mentioned indenture, bearing date the 12th day of November, in the said year of our Lord 1819, and of which said indenture the said Bishop hath within had oyer, and which is within set forth upon such oyer thereof, to wit, at the parish aforesaid, in the county aforesaid: and that the said agreement was made, and the said indenture was sealed and delivered in the life time of the said Joseph Bradshaw; and that the said Joseph Bradshaw at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, was afflicted with the said mortal disease, and in extreme danger of his life, and that his life was thereby then greatly despaired of: And that the said Thomas Joseph Trafford and the said Edward Vigor Fox, at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, well knew and believed that the said Joseph Bradshaw was afflicted with the said mortal disease, and was in extreme danger of his life, and that his life was thereby then greatly despaired of, at the parish aforesaid, in the county aforesaid; and that the said agreement was made and concluded, and the said indenture was sealed and delivered without any knowledge or privity whatsoever of the said George Uppleby, and without any intention to present the said George Uppleby to the said church, when it should become vacant, but whether or not, &c.

The argument upon this special verdict, took place on the 14th of June, 1822, when the Court of Great Sessions at Chester were divided in opinion; but in order to carry the cause up to a higher tribunal, the judgment was entered for the defendant by consent.

On a writ of error to the King's Bench, the judgment of the Court below was affirmed in Hilary Term, 1824;\* and this writ of error was brought to reverse both judgments.

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The case was twice argued, first on the 8th of July, 1828, and afterwards in May 1829.

For the Plaintiff in Error.—*Mr. Serjeant Cross.*

By the law of England, the patronage, or the right of presenting to a benefice, is a property or estate capable of being conveyed in fee, for life, for years, for any number of turns, or for the next turn only, whilst the church is full; when it is empty, it is incapable of being conveyed,† because it is like the rent of an estate become in arrear, which is a *chose* in action, and cannot be assigned, but the church is full as long as the incumbent is alive; and is equally so whilst he is in his last sickness, as in full health.

The patron, therefore, of a living may be changed at any time till the last moment of the existence of an incumbent, and a new patron substituted; and neither the common nor statute law imposes any restrictions in this respect on lay patrons.‡

It is the exercise only of the right of presenting

\* See the Report of the Case in K. B. 2 B. and C. 658.

† *Baker v. Rogers*, Cro. Eliz. 789. *Stevens v. Wall*, Dyer, 282. b. 1 And. 15. *Brokesley v. Wickham*, 1 Leon. 167.

‡ 12 Ann. st. 2, c. 12, applies to clerks only.

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by the patron for the time being, which is a public trust, and as such controlled by law: which sufficiently guards the interests of the church, by providing that the existing patron shall not nominate from corrupt motives, or by reason or in consequence of a corrupt contract.

This restriction arises from the statute 31 Eliz. chap. 6, and from this statute only: and the question turns entirely upon the construction to be put upon its provisions. It is a penal statute, and it creates forfeitures; and therefore, according to the acknowledged principle of law, must be construed strictly, and not extended by a supposed equity.

This statute avoids the presentation which the patron for the time being makes, for any money, reward, gift, profit, or benefit, arising directly or indirectly; or for any promise of such reward, directly or indirectly.\* It is direct or indirect reward, not direct or indirect presentation, which it prohibits in express terms.

In the present case, Mr. Fox, the plaintiff in error, was the patron at the time of the actual vacancy; and he selected the clerk, without any communication with Mr. Trafford; and his selection was not influenced or produced by money or reward, directly or indirectly. The presentation by the actual patron is not tainted with the least suspicion of simony.

To bring the case within the provisions of the act, it must be contended, as it was in the courts

\* See 12 Ann, st. 2, ch. 12; and also the oath in 3 Burn's Eccl. Law, which explains this.

below, that Mr. Trafford was to be considered as the patron presenting the clerk, and receiving the reward for that purpose, and the plaintiff in error as the mere instrument to carry such presentation into effect. But there is nothing in the finding of the jury to warrant such a conclusion.

It is admitted, that the grant of a next presentation during the life of an incumbent may be void, on the ground of simony; but that is where the contract is really simoniacal; a contract for the presentation *by* the patron of a *particular clerk*, for money, and the conveyance of the next presentation is a contrivance or instrument to carry it into effect, and is so found by the jury; this will be illustrated by the case of \* Winchcombe and Puleston, the leading case on the subject; the pleadings are in Winch's Entries, 887, and fully explain the nature of the transaction. The contract was made between the clerk to be presented and the patron, the incumbent being then sick of a grievous disease, and expected every day to die, that in consideration of 90*l.* to be paid by the clerk to the patron, he should procure him to be presented to the church when vacant, and to assure such presentation, he should grant the next avoidance to a person, a familiar friend of the clerk, specially nominated and appointed by him in confidence to make the presentation, with the intent that the clerk should be presented; and it is averred, that in performance of this contract the grant was made, and the contract was so found by the jury. Here was a clear simoniacal contract:

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\* Reported Noy, 25. Hobart, 165. 1 Brownlow and Golds, 164.



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and the substituted patron was the mere instrument to carry the contract into effect, and to appoint the particular clerk. The case of *Closse v. Pomroy*\* is nearly to the same effect; and is another instance of a contrivance to carry into effect a simoniacal contract.

If the presentation do not appear upon the face of the pleadings to be clearly simoniacal, that is a presentation by the existing patron of the clerk, for reward, it is a question for the Jury whether each transaction be or be not a shift or contrivance to carry a simoniacal contract into effect; as, under the statutes against usury, if there appear on the face of an instrument a loan, and a reservation of illegal interest, the Court can give judgment against its validity, but if the transaction does not appear on the face of it † necessarily to be usurious, it is a question of fact for the jury, whether it be a shift or contrivance or not. In both the cases, the really simoniacal or usurious contract ought to be shown by a special plea, when a special plea is required: and in all cases found by the jury.

The defendant has not pleaded in this case, and the jury have not found that there was any corrupt or simoniacal contract, that Trafford should present the clerk; and that the grant of the next presentation was a mere contrivance to carry it into effect.

In the absence of such a finding, the Court can-

\* *Cit. Lane*, 73.

† *Yeoman v. Barstow*, *Lutw.* 273. Per *Tanfield*, C. B. *Calvert v. Kitchen*, *Lane*, 102.

not make any presumption against the validity of the grant. Simony as well as fraud is not to be presumed, but found.

If it were competent for the Court to make any presumption, the facts pleaded and found do not warrant any such presumption in this case.

If it had been found that money was to have been given to Trafford, if Uppleby should be presented, or that it was the purpose or even intent of the plaintiff to have presented Uppleby, it might have been argued that the grant was made for that purpose, and if so, the grant might possibly be said to be an instrument to carry into effect the particular appointment; and the clerk might possibly be said to have been presented by the former patron. In such a case the substituted patron has no power of selection, but is a mere instrument, and the appointment made virtually by the old patron, is an appointment made for reward. But if there is no intention or purpose to present any particular clerk, the new patron is a free agent, may select whom he pleases, and if he select any clerk, without reward, he is not within either the letter or spirit of the act. The selection of the clerk, the object aimed at by the statute, is free from all taint. The old patron parts with, and the new patron purchases the right of selection, by means of the grant, and that right is fairly and properly exercised.

The judgment \* of the Court of King's Bench proceeds in a great degree upon the ground that Courts have a right to consider what is an evasion of a statute, a power which, it is humbly

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conceived, does not apply at least to the case of a penal statute creating forfeitures, and if allowed to be exercised, would lead to great doubt and uncertainty in the law.

Upon referring to decided cases, there is none in which it has been held that the grant of a next presentation, the incumbent being *in extremis*, is void, a short note in Winch, 63, \* excepted, in which mention is made of its having been so adjudged in Chancery, but under what circumstances does not appear; it may have been so adjudged on the special facts.

On the other hand, there is a solemn decision † of the Court, that by the grant of an advowson, when the incumbent was on his death-bed, and it was uncertain whether he would live over the night, with full knowledge in the contracting parties, the next presentation did pass, and was not avoided by simony, which is a direct authority for the plaintiff in error. If the grant of the next presentation, when united with all other future presentations, was not void; the grant of the next presentation alone could not be so. This decision has never yet been questioned until the present case.

For the Defendant in Error:—

*The Solicitor General.* ‡—This is a case within

\* Sheldon v. Brett. See remark on this case in *Barrett v. Glubb*, 2 Black, 1052.

† *Barrett v. Glubb*, 2 Black, 1052.

‡ The reasons printed at the end of the case for the defendant in Error, having been reprinted in other reports of this case, it is considered advisable to add them in a note, that they may be compared with the argument of the Solicitor General, as it was delivered in the House of Lords. They are as follows:—

the spirit of the statute of Elizabeth\*. It is found by the special verdict, that the agreement and the indenture were an expedient "to con-

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First.—Because Simony was an offence by the common law of the land, antecedently to the statute of 31st Eliz. c. 6.; and the transaction as stated upon the record, was a corrupt and simoniacal contract for the sale of the next turn or presentation under the special circumstances of the case. 1 Institute 17 B. 3 Institute 156. *Mackaller v. Todderick*. Cro. Car. 361. *Winchcomb v. Pulleston*. Hob. 167.

Secondly,—Because the presentation in the present case, was substantially a presentation by Mr. Trafford the seller, and was by him a presentation for money. *Bartlett v. Vinor*. Carth. 252.

Thirdly.—Because the transaction in question, was a shift and contrivance to evade the provisions of the statute of the 31st Eliz. c. 6.

Fourthly.—Because it was a presentation by Mr. Trafford, for money, of such clerk as Mr. Fox might nominate; and because a contract to such effect is simoniacal, though it may have passed without the privity of the clerk, who may afterwards happen to be presented; the privity of a clerk is not a necessary ingredient in a corrupt or simoniacal contract, as has been established by several authorities, and particularly in Doctor Hutchinson's case, 12 Rep. 100; and in the case of *Baker v. Rogers*, Cro. Eliz. 788. 3d Inst. 154.

Fifthly.—Because, by law, no grant can be made of the next presentation, when the church is empty, of which rule, though it has been some times said that the reason is, that the presentation is then a fruit fallen, or that it is a mere personal privilege, or that is severed from the advowson, and would pass to the executor; the true and substantial reason is public utility, and the better to guard against the mischiefs of simony, as was expressly laid down by Lord Mansfield, Chief Justice, and Mr. Justice Wilmot, in the *Bishop of Lincoln v. Wolforstan*, 3 Burrough 1504, and because the contract in the present instance was made upon the footing and understanding of the church being full in name and form only, but vacant in substance and reality. *Brookesby's Case*, Cro. Eliz. 174. s. c. 1 Leonard 167. 8 Leonard 256. *Dyer* 282.

Sixthly.—Because the law, of which the object and policy is the presenting to benefices, with cure of souls, of men of learning and

\* 31 Eliz. c. 6, s. 5.

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“vey the next presentation alone.” It is found indeed that the clerk had no knowledge of the contrivance; but that is immaterial if the transaction was simoniacal. The indenture purports to be a grant of the whole advowson, yet there is a covenant by the purchaser after a presentation or default for reconveyance. This unusual species of conveyance bears in itself a badge of fraud. No doubt the case of *Barrett v. Glubb* was under the eyes of the draftsman in framing the conveyance. The transaction amounted to simony by the common law before the passing of the statute. If not within the letter of the statute, it must be construed so as to suppress the mischief.

As a general proposition it may be admitted, that

piety, and the preventing of scandal to religion, and prejudice to the church, by preferments either of improper persons, or from corrupt motives, will not endure the danger which would arise from the sale of the right of presentation, when the incumbent is at the point of death, where the contracting parties know that fact, and where the contract is made with a view to and upon the terms of an immediate presentation.

Seventhly.—Because there is no mischief intended to be guarded against by the rule of law prohibiting the sale of the next presentation, when the church is empty, which might not be equally incurred, if such presentation could be sold when the incumbent is on his death bed, and known to be so both to the buyer and to the seller.

Eighthly.—Because the statute, 31 Eliz. c. 6, ought to receive a liberal construction, in order to reach the evil for the remedy of which it was passed, and because the deed set forth in the record was only a contrivance to pass an immediate presentation for money, in violation of the policy and evasion of the provisions of the statute.

Lastly.—Because in *Sheldon v. Brett*, Winch 63, it was expressly decided, that a grant of the next turn for money was simoniacal, when the parson was sick in his bed, and ready to die.

the line of distinction is between vacancy and plenarty. But in the *Bishop of Lincoln v. Wolverston*,\* the Judges did not agree that the question rested on the ground, that by vacancy the thing became a *chose* in action, but rather that public policy forbade the dealing for presentations during a vacancy, for fear of simony. In the stat. 3. Elizabeth there is no definition of simony. It must therefore have been an offence at common law, which inference is borne out by other authorities †. The statute only provides for penalties, and takes away the necessity of proceeding in the spiritual court. The words of the statute are “directly or indirectly,” and it prescribes no time, which is another circumstance to be considered. According to the statute, simony may be when the church is full. The receipt of money by Trafford brings the case within the word “indirectly.” He received the money to enable another person to present. The transaction according to the understanding of all the parties, was to be effected the very same day. Upon the question of construction the statute of Elizabeth is penal in some respects, but remedial in others, and statutes are to be construed according to the spirit, not the letter.‡ In the judgment in the Court below, many cases were cited to show that statutes should be construed by equity. As cases upon the statutes of usury, there being no special words in the statute, so cases on fraudulent preference in bankruptcy.

*Lord Eldon.*—Can we apply the cases as to fraudulent preference in bankruptcy to this spe-

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\* 5 Burr. 1504. † Co. Litt. 17. b. 3. Inst. 153.

‡ 2 Inst. 152. Hardres 207, 208.

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cial verdict? The doctrine must now be taken to be law. But I remember when it did not prevail. According to the early cases the doctrine as to fraudulent preference was discountenanced by Courts of Equity.

Lord Macclesfield in one case \* expresses a very strong opinion upon this subject. The first case in the courts of common law, was *Alderson v. Temple*, 4 Burr. 2235. In that case three of the Judges decided on the ground that the contract was not completed. That case was followed by *Harman v. Fisher*.†

*The Solicitor General*.—The construction upon the statutes of simony is the same in equity. In *Grey v. Hecketh*, ‡ Lord Hardwicke was of opinion that Courts of Equity contemplate the evasion of the statute.

This contract is a clear evasion upon the facts proved by the special verdict; the incumbent was treated as dead by the parties to the contract. If the living becomes void by other modes, as resignation, which may be contrived, will not the statute apply to such cases? So in the case of cession, where the resignation and cession is contrived between the parties.§ The case in Winch is put in the abridgments of Bacon, Viner, and Comyn, and received the sanction of Chief Justice De Grey in *Barrett v. Glubb*. In *Kitchen v. Calvert*, Baron Bromley

\* *Cook v. Goodfellow*, 10 Mod. 489. in which Lord Macclesfield, according to the report, declared that an assignment made on the eve of bankruptcy by a mother to her children, was just and commendable. The case of *Oudley*, 2 P. Wm. 427.

† Cowper, 117.

‡ Ambler, 268.

§ *Greenwood v. Bishop of London*, 5 Tan. 727.

says, "the intent of the statute is to eradicate  
 "all manner of simonies, and therefore, the  
 "words are not, 'if any man give money to be  
 "presented,' but they are, 'if any present for  
 "money,' and the jurors here found 20*l.* given,  
 "and nothing for what it was given, or to whom  
 "it was given; for if money be the meede, a  
 "presentation is void, and in our case without  
 "notice of the parson, the admission and all  
 "which ensued thereupon is void, by reason of  
 "the simony in the patron, and is void in the  
 "parson also; and if in this case, we are not  
 "within the words of the statute, we are within  
 "the intent clearly."

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It is not the less simony because the presentee is not privy to the contract.\* The case of *Barrett v. Glubb* is different in many particulars, and it was a fair purchase of the advowson; there was no fraudulent intent to evade the statute. It was a fair and honest contract.

*The Lord Chancellor.*—It appears by the bill and answer that he was in a very dangerous state at the time of the contract—this appears by a letter, dated the 10th of August.

*Lord Eldon.*—The expression of the letter is "that not a moment is to be lost."

*The Solicitor-General.*—In this case the contract began and ended on the same day; in *Barrett v. Glubb*, it was going on for a month. It was not argued in that case that it was virtually within the statute. Here the finding of the jury is of fraud.

\* *Baker v. Rogers*, Cro. Eliz.



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In reply.—

The case in *Winch* as digested by Comyn, supposes the bargain to be with the presentee. In *Baker v. Rogers*, the living was void: the statute relates only to presentation, not to the contract for conveyance.

*Lord Eldon.*—

This is a very important case, regard being had to the various decisions upon the subject. As to the case of *Barrett v. Glubb*, it is certainly a strong decision; there is some difficulty in saying that that was a contract which the judge of a Court of Equity should have directed to be carried into execution. The law of simony was perhaps not so well understood formerly. That case has the authority of Lord Bathurst and of Lord Chief Justice De Grey, who adhered strictly to the rules of law, as contradistinguished from equity. In that case Lord Bathurst was of opinion, that the contract might be enforced in equity, if the law would sanction the means by which it was concocted. The Court of Common Pleas were of opinion that the advowson, including the next presentation, might be sold under the circumstances disclosed by the bill and answer.

The circumstance that the injunction was not continued is of no consequence, because as it was continued until the return of the certificate, the parties would not be at liberty to act without the authority of the Court; that is, therefore, a decision to be reconciled with this. It has been argued that no fact of fraud has been found, but the question is whether it is not a fraud on the law. The question is whether, regard being had to the law of simony, if the doctrines as to fraud

on the law are applicable, the case is under the circumstances brought within the rule. As to the modern doctrine upon fraudulent preference in bankruptcy, the case of *Hamby v. Fisher*, could not then have been supported; but having been long followed in subsequent decisions, it is not now to be disturbed. It is not usual to put to the judges a direct question, but I should propose the same question in substance, indirectly, viz. "Whether on the whole of the matter contained in the special verdict, the right to present on the death of Bradshaw was in "E. V. Fox."

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The following question was then put to the judges:—

"Whether upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Rev. J. Bradshaw, was by law vested in E. V. Fox, the Plaintiff in error."

*Lord Chief Justice Best.*—After stating the 3d June. question put to the Judges, proceeded as follows:—The Judges who heard the argument at your Lordships' bar are unanimously of opinion, that, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Rev. Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error.

The patronage of churches was at first yielded by the Bishops to the lords of manors, who founded or endowed them, and annexed them to

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the manors in which the churches were situated. By the grant of a manor, the advowson appendant to it passes to the grantee. Many of these advowsons have since been severed from the manors to which they were appendant. But although advowsons, when in gross, as these which are separated from the manors to which they belonged, are called, and are a species of spiritual trusts, yet they have been said by Lord Kenyon and other Judges to be trusts connected with interests; and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity, or for the next or any number of avoidancies.

If the perpetual advowson be sold when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. It may be wise to carry the restraint on the sale of this species of property still further, and to say the next avoidance shall in no case be sold. Undoubtedly, much simony is indirectly committed by the sale of next presentations. If it is proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the Courts of Law have never thought that they were authorized to go to this length: and even in cases where the purchase of the next presentation seemed to bring a party nearer to simony than any other case, it was found necessary to have the aid of the Legislature to prevent such purchases. A clergyman might buy a next presentation, and present himself, before the passing of the statute of 12 Ann, cap. 12. The pream-

ble to the second section of that statute states, that "some of the clergy have procured preferments for themselves by buying ecclesiastical livings:" and then the section provides, that if any one, who shall either directly or indirectly take or procure the next avoidance, for money, reward, gift, profit, or benefit, shall be presented or collated, (which words limit the operation of the act to clergymen,) it shall be deemed simoniacal.

It seems to me, that if the terms of the statute of Elizabeth could be extended by equity, the case of a clergyman buying a presentation with the intention of presenting himself, might have been reached without any other Act of Parliament. If such a case as this was not within the statute of Elizabeth, the case on which your Lordships have desired our opinion cannot be affected by that statute. The church, in the present case, was full; no clergyman was privy to the agreement; and the living was not intended by the plaintiff in error, at the time when he bought the presentation, for the clerk, whom he afterwards presented.

But I would observe, that persons have recovered who appeared to be dying. The special verdict only states that the incumbent, at the time of the sale, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby greatly despaired of, and that he was so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until his death, which happened at half-past eleven at night of the day on which the

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sale was completed. Many who are afflicted with mortal diseases, and are from such diseases thought to be in imminent danger of dying, live for a considerable time ; and the effect of the diseases are sometimes so far suspended, that the persons so afflicted become again capable of performing the duties belonging to their stations in life.

If this conveyance was void, it must have been void at the time when it was executed, and would so remain into whatever hands, and under whatever circumstances the right of presentation might have passed. Now, if this incumbent had been restored to apparent health, and the vendor had sold the presentation to another person ignorant of the circumstances under which the first sale was made, it would be most unjust to hold that the second sale was void ; and yet this would be the necessary consequence of a decision, that the first sale was simoniacal. While the law permits the next presentations of livings to be sold during the life of the incumbent, as long as the incumbent is alive, the sale is good. Every one who purchases a next presentation, contemplates the death of the incumbent. If this contemplation made the sale void, no sale of a next avoidance could be good. If the death of the incumbent, and the prospect of using the presentations, may be contemplated, the time when the death is to happen cannot be material.

This case has been compared by the counsel for the defendant in error to those of contemplation of bankruptcy ; but a party is not permitted to do an act in contemplation of bankruptcy, which is injurious to creditors. A transfer of goods, or payment of money in contemplation of bankruptcy,

was before the 6th Geo. 4, void. By that act such a transfer or payment is an act of bankruptcy, because such transactions are direct frauds upon the creditors of the bankrupt. But the death of an incumbent may be contemplated, and the purchasing of the next avoidance, in consequence of such contemplation, is no fraud upon any one. The cases, therefore, have no resemblance to each other. The making the legality of the transaction to depend upon the state of the incumbent's health, would give occasion to much expensive litigation, and, probably, to much false swearing, and would keep churches for a long time void.

The affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful unsatisfactory enquiries. It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the next avoidance of a benefice, and more difficult to ascertain by evidence, when an incumbent was within that degree. The most convenient rule is that which I conceive the law has already established; namely, that the right to sell the presentation continues as long as the incumbent is in existence.

The judgment of the Court below is, according to the words of the Chief Justice "founded on the language of the 31st Elizabeth, cap. 6, and the well-known principle of law, that the provisions of an Act of Parliament shall not be evaded by shift or contrivance." The words of the fifth section of the act are, "That if any person shall, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason

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of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatever, directly or indirectly present or collate any person to any benefice, or give or bestow the same, for or in respect of any such corrupt cause or consideration, &c." This clause applies only to the person presenting to the living. If he has received no reward, or promise of reward, the presentation is not affected by the terms of the act. The Plaintiff in error, who made the presentation, received no reward, nor had any expectation of reward, for making this presentation. I agree, that if some other person had received a reward for the Plaintiff in error, and was to account to him for it; if the Plaintiff in error was not the real purchaser of the avoidance, but the person presented, or some one in his behalf, these and many other things might be considered as frauds on the act, and have avoided the contract. But such things should have been shewn by the pleadings and found by the jury. All that appears on this record, is, that the Plaintiff in error bought the next avoidance of a living that was full, and that, without any corrupt consideration, he used the right of presentation, which he had purchased: all this he had a right to do. There is no circumstance found that shews this to have been a fraud on the Act; unless it be a fraud on the Act to buy the presentation to a living, which the seller and buyer expect will soon become vacant. Presentations are bought and sold every day, with this expectation.

There is no legal authority to support the judgment of the Court, except a short and loose

note in Winch's Reports of Hatton, saying what used to be done in Chancery; on the other hand, the case of *Barrett v. Glubb*, is directly opposed to the judgment of the Court of King's Bench. It was thought that the case had not the weight of a judicial decision, because it was not acted upon, but it was acted upon—Lord Bathurst decreed the conveyance of the advowson, which included the next presentation, and gave the purchaser and his clerk their costs. The seller must have acquiesced in this decision, or he would have prosecuted his *quare impedit*, and if the Common Pleas had retained the opinion that they had certified to the Chancellor, he might have carried it by a bill of exceptions to the King's Bench. When the Chancellor decreed a conveyance, without doubt it was such a conveyance as gave the purchaser a legal title from a time before the death of the incumbent, by making the assignment take effect from the date of the contract to assign. There was therefore no occasion for any injunction, as was supposed by the King's Bench; the question by the conveyance decreed was fairly raised for another Court of Law, if the party had not completely acquiesced in the judgment of the Common Pleas, confirmed by that of the Chancellor. There are no other cases in the books, which bear much on the question proposed to us.

For the reasons given in support of the Judge's answer to that question I only am responsible.

*The Earl of Eldon.*—This case involves questions certainly of very considerable importance. A case upon the same subject was decided by the Court of Common Pleas many years ago,

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and the manner in which that case was decided in the Court of Common Pleas was of very great importance; first, because it was decided by most learned judges, and secondly, because it was a case in which a Court of Equity sent the case for the opinion of that Court of law, in order to enable the Court of Equity to decide what it should do in equity.

The case was thus:—There had been a purchase of an advowson, the incumbent being at the time in such a state that he died within two days afterwards. The period was very nearly, if not exactly the same as in the present case. It was one circumstance in that case, that the intended purchaser of the estate stated that there must be no delay, but that the contract should be immediately completed. The Court at that time was filled by Lord Chief Justice De Grey, a very eminent judge, Mr. Justice Blackstone, and by two other judges. The case was sent for the opinion of the Court of Common Pleas, for the purpose of enabling the Lord Chancellor, Lord Bathurst, to determine whether the contract should be carried into execution by an actual conveyance. That being the nature of the case, and that being a case in equity, makes it a much stronger case than if the Court of Equity had not taken that course; for with respect to many cases of contract, which come before Courts of Equity, the parties resort to a Court of Equity because it is conceived there are grounds upon which a Court of Equity will grant its interposition to carry into effect that contract. In that case the controversy was, whether supposing that contract to be good in

law, the party ought not to be left to his remedy at law, instead of coming into Equity for a specific performance of the contract. The Chancellor of that day thought fit to take the opinion of the Court of Common Pleas, upon the question whether the advowson being sold at such a period nearly approaching to the death of the clergyman, the presentation as well as the advowson being included in the conveyance, the conveyance carried with it the assignment of the presentation; and the Court of Common Pleas were of opinion that it did, and so they certified to the Court of Chancery.

I observe in the proceedings in this case in the Court below, that the Court seems not to have been fully informed by the counsel at the bar, because two judges of that Court now concur in the opinion that this was a good conveyance, who then thought it was not so. The Court seems to me to have been not specifically informed as to what was the fact. We have heard it stated at the bar, that an injunction had been granted by the Lord Chancellor against the proceedings in the *quare impedit*, and that after that opinion of the Court of Common Pleas was communicated to his Lordship, he did not continue the injunction. Now that circumstance is really of no weight; it was quite unnecessary to continue the injunction, because the moment it was intimated that in the opinion of the Court of Common Law, and in the opinion of the Lord Chancellor, that was a good contract to be carried into execution, it was not necessary to take the trouble of asking for the injunction being continued. For the convey-

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ance was immediately executed which carried the contract into execution, and that conveyance having been executed, it would be a good conveyance of the presentation as well as of the advowson; and the conveyance being a good conveyance of the presentation, being declared by the Court of Chancery to be a good equitable conveyance of the presentation, and the Lord Chancellor proceeding on the opinion of the Court of Common Pleas, there was an end of all question.

Now regarding the effect of this decision on human transactions, seeing that in all probability many transactions have taken place upon the footing of it, it does appear to me, I confess, very undesirable that that decision should be shaken by the Courts of Law. I had much rather an Act of Parliament should be passed on the subject, than see a further extension of that doctrine, of which we have heard much in the argument at the bar. I most fully concur in the opinion which has been expressed by the learned Judges.

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The question was then put by the Lord Chancellor.

Judgment reversed.

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IRELAND.

(COMMON PLEAS—EXCHEQUER CHAMBER.)  
(IN ERROR.)

HENRY HARDING - - - - - *Plaintiff.*  
JOHN POLLOCK, and ARTHUR HILL }  
CORNWALLIS POLLOCK - - - - - *Defendants.*

Upon a special verdict the Jury found that by an act of Parlia-  
ment in Ireland, of the 3rd and 4th of Philip and Mary,  
it was enacted that the King and Queen, and her successors,  
should be entitled to the counties of Leix, Slievemarge,  
Irry, Glinmaliry, and Offaly, and that for making them shire  
grounds, a certain portion of the said counties should thence-  
forth be a shire or county, by the name of the King's  
county, &c.; and that from the year 1556, (the date of the  
act) the Kings and Queens of Ireland have nominated and  
appointed, and been used to nominate and appoint fit per-  
sons to fill the office of Clerk of the Peace for the King's  
county, to the year 1798, in which year it was found that  
the Defendants in error, were by patent created Clerks of the  
Peace within every county in the province of Leinster except  
Kilkenny, to hold for their lives, &c.; and that they under  
the patent they held, exercised the duties of the office till  
1800; and that the King's county is in the province of  
Leinster. The verdict then found that the Custodes Rotu-  
lorum of the county have appointed persons to fill that office  
in the said county, from the year 1760 to the present time,  
(1819) who have held and enjoyed the said office accord-  
ingly, with the exception of, &c. who were in possession  
under the Crown; and further set forth letters patent, dated  
in 1776, appointing the Earl of Drogheda Custos Rotulorum  
of the King's county during pleasure, and also certain deeds  
or warrants under seal, whereby the Earl of Drogheda ap-  
pointed successively two Clerks of the Peace for the King's  
county, who executed the duties, and received the emoluments  
of the office without interruption from 1772.

Held reversing the judgment in the Court below, that the  
Custos Rotulorum, and not the King, has by law, the right  
to appoint the Clerk of the Peace in the King's county.

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**T**HIS was a writ of error from the judgment of the Court of Exchequer Chamber in Ireland, affirming the judgment of the Court of Common Pleas in Ireland in this cause. The Plaintiff in error, claimed the office of Clerk of the Peace for the King's County in Ireland, and had been several years in possession of it, under an appointment by the Custos Rotulorum of the county. The Defendants in error, claimed the same office, under letters patent from the Crown. The action was brought for money had and received, to ascertain whether the right to make such appointment for that county was in the Crown or in the Custos Rotulorum.

The Defendant below pleaded two pleas: first, the general issue; and, secondly, the statute of limitations, in both of which issue was joined; but, as the Plaintiffs below sought only to establish their right, no question arose on the second plea, the object of which merely was to cover the profits received more than six years before the commencement of the action.

The case was tried before Lord Norbury, at the sittings after Michaelmas Term, 1819, the venue being laid in the county of the city of Dublin. At that trial, a special verdict was found, stating in substance as follows: "That His late Majesty " King George the Third, by letters patent, under " the great seal of Ireland, dated the 30th of July, " 1798, granted to the said John Pollock and Arthur Hill Cornwallis Pollock (the Defendants in " error,) the office of Clerk of the Peace within " and throughout the province of Leinster, in " Ireland, and within every county thereof, ex-

“ cept Kilkenny, to hold for their lives, and the  
 “ life of the survivor of them, which letters patent  
 “ were duly enrolled in the Rolls Office, on the  
 “ 4th of August, 1798, and were duly accepted  
 “ by the said John Pollock and Arthur Hill  
 “ Cornwallis Pollock, and that they are fit and  
 “ proper persons to hold the said office ; and that  
 “ by virtue of the said patent, they duly ob-  
 “ tained possession of the said office in the King’s  
 “ County, and exercised the duties thereof by  
 “ them, and their sufficient Deputies, until the  
 “ year 1800. That the King’s County is in the  
 “ province of Leinster, and is one of the counties  
 “ thereof ; and that by an act of Parliament in  
 “ Ireland, of the 3rd and 4th of Philip and Mary,  
 “ and in the year of our Lord, 1556, it was  
 “ enacted, that the king and queen, and her  
 “ successors, should be entitled to the counties  
 “ of Leix, Slievemarge, Irry, Glinmaliry, and  
 “ Offaly, and that for making them shire grounds  
 “ a certain portion of the said counties should  
 “ from thenceforth be a shire or county by the  
 “ name of the King’s County, and that the resi-  
 “ due should be a county by the name of the  
 “ Queen’s County. That from the year 1556,  
 “ (at which time it appears by the act of Parlia-  
 “ ment that the lands comprised within the  
 “ King’s County were first made a shire by the  
 “ name of the King’s County,) the kings and  
 “ queens of Ireland have nominated and ap-  
 “ pointed, and been used and accustomed to  
 “ nominate and appoint, fit persons to fill the  
 “ office of Clerk of the Peace for the King’s  
 “ County to the year 1798 ; and that the Cus-  
 “ todes Rotulorum of the county have appointed

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“ persons to fill that office in the said county,  
“ from the year 1760 to the present time, who  
“ have held and enjoyed the said office accord-  
“ ingly, and received the emoluments thereof,  
“ with the exception of Hugh and Andrew Car-  
“ michael, appointed by the Crown ; and of one  
“ James Cowly, the deputy of the said John  
“ Pollock, who were severally in possession un-  
“ der the Crown.” The special verdict then  
states, “ Letters patent of his late Majesty, bear-  
“ ing date October 30th, 1766, and duly enrolled,  
“ by which the Earl of Drogheda was appointed  
“ Custos Rotulorum of said county during his  
“ Majesty’s pleasure ; and then sets out a writing,  
“ under hand and seal, whereby the said Lord  
“ Drogheda, in 1772, appointed Edward Moore  
“ Dowden Clerk of the Peace and deputy Cus-  
“ tos Rotulorum of the said county, during the  
“ pleasure of the said Earl: And finds, that the  
“ said Dowden took upon himself the execution of  
“ the duties of the said office, and executed the  
“ duties and received the emoluments thereof,  
“ until his death in 1789: And then sets out  
“ an appointment of the said Henry Harding,  
“ (the Plaintiff in error,) in said year to said  
“ office, by said Lord Drogheda, under hand and  
“ seal, during good behaviour : And finds, that  
“ said Harding was and is a proper person to hold  
“ the said office, and did all things necessary to  
“ qualify him to hold the said office, and to make  
“ him a complete Clerk of the Peace, and was  
“ admitted to the said office and took on him the  
“ duties thereof, and has continued from thence  
“ to the present time to execute the duties and  
“ receive the emoluments thereof, without inter-

“ ruption by any person, and conducted himself  
 “ properly therein ; and that said Lord Drogheda  
 “ is still” (at the time of finding said verdict,)  
 “ Custos Rotulorum of said county. The special  
 “ verdict then finds, that within the last six years  
 “ the Defendant received fees and emoluments of  
 “ the said office to the amount of one shilling ; and  
 “ with the formal conclusion submits the right to  
 “ the Court.”

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On this special verdict the Court of Common Pleas in Ireland, in Trinity Term, 1821, after full argument, gave judgment unanimously in favour of John Pollock and Arthur Hill Cornwallis Pollock, the Plaintiffs in the action.

From this judgment Henry Harding, the Defendant in the action, brought a writ of error returnable into the Court of Exchequer Chamber in Ireland, where he assigned the general error only.

The case was again fully argued in that Court, which in June 1823, affirmed the judgment of the Court of Common Pleas, two of the Judges dissenting ; whereupon the original Defendant brought his writ of error returnable into Parliament, where he again assigned the general error.

The case was argued\* before the House of Lords, first in 1827, and afterwards before the Judges in 1828

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\* The arguments of counsel are omitted, because the topics of argument and the authorities are all noticed in the opinions delivered by the Judges. For the same cause the reasons printed at the end of the cases for the Plaintiff and Defendant in error are not reprinted.



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For the Plaintiff in error—*Mr. John Campbell* and *Mr.*

For the Defendants in error—*The Solicitor General* and *Mr. Brougham.*

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In the course of the argument a question arose as to a word occurring in the statute 12 Ric. 2. c. 10, whether it was "*clerk or clerks.*" Upon this question, the Lord Chancellor said, "Mr. Justice Powell interprets it, clerk of the Justices: 'Whenever the Justices take 4s. a day for their time at the said sessions, their clerk is to take 2s.'; '*in lour clerc.*' It is a clerk of the whole body, both in the French and the English translation. The folio edition of the statutes from which I read, was printed in pursuance of the address of the House of Commons,—to that we must refer. The other printed edition is different, but unless that edition was verified by comparison with the record, the House would consider themselves bound by the edition printed under authority."

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Another question arose upon an inconsistency of statement in the special verdict, the allegation in first part being, that "By virtue of a patent (dated the 30th of July, 1798,) John Pollock and Arthur H. C. Pollock obtained possession of the office (of Clerk of the Peace,) in the King's County, and exercised the duties thereof by them and their sufficient deputies until the year 1800." In a subsequent part of the special verdict is set forth an appointment by Lord Drogheda, in 1789, of Henry Harding, as Clerk of the Peace during good behaviour; that he was

“ a proper person to hold the office, and did all  
 “ things necessary to qualify him to hold the  
 “ office and to make him a complete Clerk of  
 “ the Peace, and was admitted to the said office,  
 “ and took on him the duties thereof, and has  
 “ continued *from thence to the present time*, to  
 “ execute the duties and receive the emoluments  
 “ thereof, without interruption,” &c. Upon this  
 question the following observations were made :

*The Lord Chancellor.*—It says they were in possession, and exercised the duties, but there is no averment that they received the fees. In the latter part it is averred, “ that he received the fees, perquisites, and emoluments thereof, without any interruption;” that is, as to the possession of the fees and emoluments, “ with the exception of Hugh and Andrew Carmichael, who were in the possession of the office,” saying nothing as to the fees and emoluments. Putting the whole record together, it appears, that the Plaintiff in error, was in possession during the whole of the period ; that he received the fees and emoluments without interruption ; that the Defendants in error were in possession, or a deputy rather in possession, for the period of two years, and received no fees and emoluments : the words “ without interruption,” appear to be limited to the words “ fees and emoluments.”

*Mr. Campbell.*—I say the word interruption applies to all.

*The Lord Chancellor.*—Yes, so it does, if it stood by itself, but in the preceding page it is stated thus : “ And the jurors upon their oath, do further say and find, that the persons appointed by the Custos Rotulorum, have held and

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“ enjoyed the said office of the Clerk of the Peace, “ from the year 1760 to the present time, and received the fees and emoluments thereof, with “ the exception of Hugh and Andrew Carmichael, who had been appointed by the Crown, “ and James Cowley, who had been appointed “ by the Plaintiff John as his deputy, in the said “ office of the Clerk of the Peace of the King’s “ County aforesaid, and who severally were in “ possession of the said office under the Crown :” and in a previous page it is stated, “ that they “ were in possession of the said office, and exercised the duties thereof by themselves, or their “ sufficient deputies, under or by virtue of said “ patent, until the year 1800.” The only way, therefore, in which you can reconcile these apparently conflicting averments is, to state, that as to the possession, there was an interruption for two years; but no interruption as to the receipt of the fees and emoluments. You may so reconcile them.

*Mr. Campbell.*—The grant by the Crown is to John Pollock, and Arthur Hill Cornwallis Pollock. John could not appoint under this patent. It must be referred to some antecedent grant to John separately, before the joint grant was made.

*The Lord Chancellor.*—In a previous part, it appears they were in possession from 1798 to 1800. It seems impossible to reconcile the statement, if possession is material, in the different parts of this record. With regard to the possession, it states in one part of the record, that in the year 1798 this appointment took place, and that the party was in possession two years till 1800. In a subsequent part, it states that other parties were in possession from an anterior period, down to the

present time, without any interruption whatever. It states first, that the parties who took under the grant of 1798, were in possession, and exercised the duties thereof by themselves, or their sufficient deputies, under or by virtue of the said patent, until the year 1800, a period of about two years. In a subsequent part it states, that the other grantee was in possession, from an anterior period down to the present time, and received the fees and emoluments of the office without any interruption. Those are the findings upon the record, and if they are material, they are directly at variance with each other; how is it possible that this House can deal with it? I said, assuming that it is a material averment on the record, it is inconsistent in itself. It states, without interruption. I point this out for consideration. This cause has been depending ten years, and we should be very sorry to send the record down again.

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At the conclusion of the argument the following observations were made:—

*The Lord Chancellor.*—It appears that in the year 1556, a statute was passed by the Irish parliament, by which the King's County and the Queen's County were created. The Custos Rotulorum was appointed I believe after that, and it appears according to the special verdict in this case, that for a period of two hundred years, the Crown have uniformly appointed in the King's County to the office of Clerk of the Peace.

This action was tried in the Court of Common Pleas in Ireland; a special verdict was found, and upon that judgment was given for the Plain-

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tiff. Upon that judgment, a writ of error was preferred to the Court of Exchequer Chamber. The subject was discussed before ten of the judges; and eight were of opinion to confirm the judgment of the Court of Common Pleas. From that judgment of the Exchequer Chamber of Ireland, the writ of error has been brought to this House.

It was considered during the last session of parliament, when this case came on for consideration before a noble and learned friend of mine, who at that time held the office, which I have now the honor of holding, that the general question was of such importance, that it would be advisable to request the attendance of His Majesty's learned judges, to obtain their opinion upon some of the questions, which might arise out of the discussion of this subject.

The main point for consideration is, as to whether or not the appointment to the office of Clerk of the Peace for the King's County in Ireland is vested in the Crown, or in the Custos Rotulorum. I have, with the view of obtaining the opinion of the learned judges as to this point, which will be a guide to the determination of your Lordships, framed several questions, which, with your approbation, I shall submit to the consideration of the judges; one as arising out of the discussion at your Lordships' bar, to ascertain what opinion the learned judges entertain as to this point; namely, whether previously to the statute of Henry 8th, the appointment to the office of Clerk of the Peace in the English Counties was vested of common right in the King, or whether it was in the Custos Rotulorum?

I have also framed another question, to ascertain the opinion of the learned judges as to what was the law in Ireland up to the year 1800, with respect to the general counties in Ireland? And I have also framed a question more immediately applicable to the present subject, whether, having regard to the statute passed in the year 1556 by the Irish parliament, and having regard to what has taken place under that statute, the learned judges are of opinion that the appointment to the office of Clerk of the Peace of the King's County in Ireland, belongs of right to the Crown, or whether it belongs to the Custos Rotulorum? Those are the principal points of the case which have been argued at your Lordships' bar.

But other questions have arisen out of the particular form of this Record, and your Lordships will concur with me in lamenting that after this subject, a subject of very great importance, has been now in agitation for a period of ten years, after a judgment pronounced in the Court of Common Pleas in Ireland in the first instance; after an appeal to the Court of Exchequer Chamber in that country, and after an appeal to this House, any doubt should arise, whether from defects in the Record, the case is in such a shape as to enable your Lordships to decide upon it as it at present lies upon your table. Several questions will arise out of those points which are peculiar to this case, originating in the shape of the Record, and with your Lordships' permission I shall prepare some questions, which I consider material, arising out of the Record, and arising out of those particular points to which your attention has been directed, with a view to obtain the opinion of the

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learned judges upon those points which are essential before we come to the consideration of the main question.

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On 1828, the following questions were proposed by the Lord Chancellor, and put by the House to the judges for their opinions:

First, whether the appointment to the office of Clerk of the Peace within the shires of England did by law, previously to the passing of the Act 37 Hen. 8, c. 1, belong of right to the Crown or to the Custos Rotulorum of the shire, by virtue of his said office, or to any, and to what person or persons?

Secondly, whether the appointment to the office of the Clerk of the Peace within the shires of Ireland did by law, in and previously to the year 1800, belong of right to the Crown or to the Custos Rotulorum of the said shire, by virtue of his said office, or to any, and what other person or persons?

Thirdly, whether the right to appoint to the office of the Clerk of the Peace within the King's County in Ireland did by law, in and previous to the year 1800, belong to the Crown or to the Custos Rotulorum of the said shire, by virtue of his said office, or to any and what other person or persons?

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On the 18th May, 1829, the judges delivered their opinions as follows:—

*Littledale J.*—Upon the first question, I am of opinion that the right to appoint to all offices connected with the administration of justice, is vested in the Crown by the royal prerogative, and if the

Crown, by its royal prerogative, constitutes a new Court of Justice, it may appoint the judges of the Court and all the subordinate officers, upon such terms as it shall think proper. So also if the Crown, by virtue of an Act of Parliament, is authorized to constitute a Court, it may appoint the judges of that Court, and also the officers, in such manner as it may deem most expedient to carry into effect the object of the legislature. But if in the constitution of a Court formed under the authority of Parliament, the Crown is to appoint the judges alone, but not the officers of the Court, the act being silent as to the appointment of any officer, then I apprehend, as a matter of law, the power of appointing the officers belongs to the Court itself, or to some member or members of the Court to whom particular duties are assigned, and who in the discharge of these duties must commit the performance of the minor part of those duties to some subordinate officer or clerk : and if the Crown having the right of appointing the officers, has once waived it, and has suffered either the judges of the Court at large, or some particular judge, to whom special powers are confided, to appoint the officers necessary to conduct the subordinate business of the Court, then I apprehend the Crown cannot afterwards interfere and take from the Court or particular members the appointment of the subordinate officers ; for otherwise great confusion would ensue in the administration of such officers, acting under the authority of the Court, but liable to be displaced, and the Crown by allowing the Court to appoint the officers in the first instance has manifested its intention that that should be the course of proceeding in the

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administration of justice in that Court. If I am right in taking this view of the subject, I think it will follow that the appointment to the office of Clerk of the Peace within the shires of England did by law previously to the passing of the Act of 37 Hen. 8th, cap. 1, belong of right to the Custos Rotulorum of the shire, by virtue of his office.

The office of Custos Rotulorum and that of Clerk of the Peace, are offices created within time of legal memory; no immemorial usage or prescription can therefore be applied to either of them. But, if it be true, that in the cases of courts, or superior offices entrusted with the administration of public justice, the principle be recognized that the members of the court, or some superior officer, have appointed the subordinate officers or clerks to assist in the administration of justice, then I take it on the creation of new courts or superior officers within time of memory; the same principle will apply that the Court or superior officer, as the case may be, have, as incident to the Court or office, a right to appoint the subordinate officers or clerks, saving always the right of the Crown, on the first creation of the Court or superior office, to constitute and regulate it as it thinks proper, both as to the subordinate officers and clerks, and in other respects as the Crown thinks fit.

The oldest authority that recognizes this common law principle is the statute of Westminster, 2nd, 13 Edw. 1. stat. 1, cap. 30, "that all justices of the benches from henceforth shall have  
" in their circuits clerks, to enrol all pleas pleaded  
" before them, like as they have used to have in

“ time passed.” And Lord Coke, in commenting upon this statute, in 2nd Institute, 425, says “ this power is as antiently they used to have, that is by the common law.” And he states the reason why this clause of the Act was passed, that the king had been informed that he might appoint the officers on the circuits, which this writer declares to belong to the justices, and that they enjoyed the same of antient time, that is by the common law; and then he goes on to give the reason of the justices having this power. (At present indeed the senior judge appoints, and has done for a considerable time past; how this has happened I cannot now ascertain, whether the second judge had acquiesced in the senior judge appointing so long that it cannot now be objected to, or whether the practice in modern times may be evidence of a usage before the time of legal memory, so as to found a right, such as the statute referred to an antient usage) “ and the reason thereof is twofold; 1st For that the law doth ever appoint those that have the greatest knowledge and skill to perform that which is to be done; 2nd, The officers and clerks are but to enter, enroll or effect that which the justices do adjudge, award, or order, the insufficient doing whereof maketh the proceeding of the justices erroneous, than the which nothing can be more dishonourable and grievous to the justices, and prejudicial to the party, therefore the law, as here it appeareth, did appropriate to the justices the making of their own clerks and officers, and so to proceed judicially by their own instruments, and that this was the common law. The king cannot grant the office of the shire or county clerk” (who is to

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enter all judgments and proceedings in the County Court) “for that the making of the shire clerk “belongeth to the sheriff by the common law, as “in Mitton’s case it appeareth, “*et sic de cæteris*.” In Mitton’s case, 4 Coke 32, the queen Elizabeth had granted the office of county clerk, or shire clerk, to Mitton and others. The queen appointed Hopton to be sheriff of the county, who interrupted Mitton. It was resolved that the County Court, and the entering of all proceedings in it, are incident to the office of sheriffs, and therefore cannot by letters patent be divided from it, and after adverting to some other points which had been raised, it goes on to state, as a general answer to all objections, that “great inconvenience would “ensue to sheriffs, who are great and ancient “officers and ministers of justice, if such grants “should be of validity, for by such, as well the “entering of all proceedings in the same Court “as the custody of the entries and Rolls there “do belong to the office of sheriff.” He proceeds afterwards to say “if the Record be embezzled “the sheriff shall answer for it, and therefore it “would be full of danger and damage to sheriffs “if others should be appointed to keep the entries “and Rolls of the County Court, and yet the “sheriffs should answer for them as immediate “officers to the Court, and therefore the sheriff “shall appoint clerks under him in his County “Court, for whom he shall answer at his peril. “The same law of the sheriffs turn, and law and “reason require that the sheriff, who is a public “officer and minister of justice, and who as an “officer of such eminency, confidence, peril and “charge, ought to have all rights appertaining to

“ his office, and ought to be favoured in law before  
 “ any private person, for his singular benefit and  
 “ avail.” And then it goes on to state, that the  
 sheriffs shall have custody of gaols, and shall put  
 in such keepers, for whom they will answer, and  
 the reason given is, because they shall be answer-  
 able for escapes; and it goes on state, that it  
 would be against all reason that they should be  
 answerable for escapes, and subject to amercia-  
 ments, and yet that another should have the  
 keeping and custody of the gaol. The Parlia-  
 mentary declaration in the statute of Westminster,  
 and Lord Coke’s Commentary, and also the reso-  
 lutions in Mitton’s case, seem sufficient to show  
 that in antient offices the right of appointment  
 of the subordinate officers and clerks is in the  
 Court or the superior officer, as the case may be;  
 and I apprehend that if a new Court or office be  
 created, the same rules will attach upon them.

The reasons for it are precisely the same. The  
 language of Lord Coke in his Institutes, and the  
 language of the Court in Mitton’s case, apply in  
 every respect to such officers as the Custos Ro-  
 tularum and the Clerk of the Peace, whose case  
 is now under consideration.

With respect to the principle of new offices  
 being to be governed by the rules of the common  
 law, I would refer to the case of *Wilkes v. Williams*.\*  
 That was an action on promises, and the Defen-  
 dant pleaded in abatement, that he was a tipstaff  
 of the Court of Chancery, and then he says, that  
 there is an antient custom in the High Court of

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\* 8 Term Reports, p. 631.

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Chancery, time out of mind, that all the resident officers, clerks and ministers of the same Court of Chancery, shall be freed and quieted, as antiently used to be, according to the liberties and privileges of the Court immemorially used, and ought not to be impleaded elsewhere than before the Chancellor or Keeper of the Great Seal; and on a demurrer to the plea, objections were taken to the plea, and amongst others it was stated to be pleaded, as an exemption to offices created within time of memory, as to which the Court held that such a custom might well extend to new created offices, for where an immemorial privilege is claimed for all the officers of the Court, and some officers are made within the time of legal memory, they must also fall within the privilege. So I say here, that if the common law allows antient Courts and superior officers to appoint their clerks and subordinate officers, the same common law principle applies to new Courts and newly created offices.

The precise origin, either of the Custos Rotulorum or of the Clerk of the Peace, does not appear to be very well known. There were, at the common law, persons who were called Conservators of the Peace; some of these were such by virtue of certain offices which they held, others appear to have been elected; the precise nature and extent of their functions do not appear clearly defined, nor whether they had a clerk to enrol and enter their proceedings, nor how that clerk was appointed. These conservators were discontinued, and the mode in which the constitution of the conservators of the peace was changed, and the present justices of the peace were constituted,

will be seen in Lambard's Eirenarcha.\* The origin of the justices of the peace, as at present constituted, is to be found in statutes passed in the reign of Edward the 3rd,† and consequently, within time of legal memory. It may be considered that the last of these was more particularly that which decided the character and constitution of the present justices. These justices at large had at first the custody or keeping of the rolls, and even still they have them in point of law, as all writs of certiorari and error are directed to them. No mention is made in any of these acts of Edward 3rd, of any such officer as Custos Rotulorum, (and it is not very clear when he was first constituted), nor of any such office as Clerk of the Peace; but in the 12th Richard 2nd, cap. 10, it is provided that the clerk of the justices shall have 2s. a day for his wages, and the clerk of the justices I take to be the present Clerk of the Peace. In the 11th Henry 7th, cap. 15, the Custos Rotulorum is mentioned as being to have the oversight of the sheriffs in the cases mentioned, and it seems from the reference in Lambard,‡ that there was such an office as Custos Rotulorum as early as the 14th of Richard 2nd. It does not appear whether, previously to that time, there was any such person as the Custos Rotulorum, and if there was not, the justices would, as incident to their office, have a right to appoint the clerk, according to the rules of the common law.

But as soon as the justices became a distinct

\* Cap. 4, p. 21. † 1st Edw. 3, stat. 2, cap. 16. 4 Edw. 3, cap. 2. 18 Edw. 3, stat. 2, and 34 Edw. 3, cap. 1.

‡ Eiren. p. 42.

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Court, it would be inconvenient that the records should be dispersed amongst them promiscuously, and not kept together in one place. Lord Holt, in *Harcourt v. Fox*,\* says, he looks upon it, it was in the power of the king to appoint some particular person to have the custody and charge of the Records, and that he should be a person responsible to the justices for the safe keeping of them, and he says this was thought convenient, for the words at the end of the commission of the peace are "we appoint you," such a one, "to be "Keeper of the Records and Rolls of the County." He goes on to say "this seems to me to be "the commencement of the office of Custos Rotulorum, for no one being more in commission "than another, it was in the power of the king, "by his prerogative, to appoint one to keep the "records. But, therefore, it does necessarily follow, that no person whatsoever could be Custos "that was not a justice of peace in commission." Then Lord Holt goes on to consider how the Custos came to appoint the Clerk of the Peace, he says "the Custos names him for this reason, "because the rolls and records of the sessions "being by the Commission put into the custody "of the Custos Rotulorum, the clerk being the "person that must be trusted with the rolls to "make entries upon, to draw judgments, to record "pleas, to join issues and enter judgments, then, "by common right, and by the common law of "the land, it belongs to him that hath the keeping "of the records to nominate this clerk, and not "to any one else, and it would be the most in-

\* See 1 Shower 426, 506, 516, and Shower's Parl. Ca. 158, 4 Mod. 167, 12 Mod. 42.

“ convenient thing in the world that the Custos  
 “ Rotulorum being entrusted with the custody of  
 “ the records, by his commission, any other  
 “ should be made Clerk of the Peace for the  
 “ actual possession of these records, than such a  
 “ one as he should appoint, where upon any loss  
 “ or miscarriage he is answerable for it himself to  
 “ the king and the subject.”

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This reasoning of Lord Holt, as to the propriety of the person who has the records of a Court entrusted to him, appointing a subordinate officer to take care of them, is certainly extra judicial, but it tells in precisely with what is said by Lord Coke in his 2nd Institute, commenting on the statute of Westminster the 2nd, as to clerks of assize, and the language of the Court in Mitton's case.

This conjecture of the origin of the Clerk of the Peace being appointed by the Custos Rotulorum, is called in question, first, because in 12 Richard 2nd \* he is called clerk to the justices; secondly, because Lambard † calls him, in conformity with the statute of Ireland the second, clerk to the justices, and not the clerk of the Custos Rotulorum only; thirdly, because in the Year Books ‡ he is called the clerk and the attorney of the king. In the reign of Richard the 2nd, when he was called clerk of the justices, it does not appear that there was any Custos Rotulorum; but, admitting that there was, and adopting the assertion of Lambard, that at the time when he wrote, the officer was clerk to the justices, it does not follow that he is to be appointed by the justices. The justices form the Court, and therefore he may with

\* Cap. 10. † Eirenarcha, p. 394 ‡ 2nd Hen. 7th fol. 1.



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propriety be called their clerk, because he is to record their proceedings, and it is his duty to attend the Court.

It is to be observed also, that the legal custody of the rolls and records is in the justices, though the actual custody is in the *Custos Rotulorum*, who is to produce them at the sessions, and upon other proper occasions, to the justices, and therefore there is no more inconsistency in calling him clerk to the justices when he is appointed by the *Custos Rotulorum*, than there is in saying that the rolls are in the legal custody of the justices, though the actual custody is in the *Custos*, by virtue of the King's commission. But if Lambard's authority is to be taken, that at the time when there was a *Custos*, the Clerk of the Peace was the clerk of the justices, his authority must be taken altogether; and in the next paragraph he says "Howbeit" (as much as to say, notwithstanding he is clerk to the justices) "the nomination and appointment of him hath long time belonged to the *Custos Rotulorum*. And this office was also for a time given by the king's letters patent for term of life, as that of the *Custos Rotulorum* was, until the statute of 37 Henry 8, cap. 1, recontinued the *antient order* of giving it *by the Custos Rotulorum only*." He therefore considers, that the *antient order* of giving it was in the *Custos*.

Then, as to his being called in the year books clerk and attorney of the king, nothing can be inferred against the right of the *Custos* from that; if he is to enter the proceedings on the rolls and records, he is, as far as that applies to entries in which the king is concerned, the clerk and at-

torney for the king; but that has nothing to do with the right of appointment. The officer on the circuit who, in common parlance, is called clerk of assize, is really the *clerk of the assize and clerk of the Crown*, and is so called in his grant of office. The statute of Westminster speaks of the justices within their circuits, appointing their clerks to enrol pleas pleaded before them, in general terms; and when his duties come to be specified, he is called clerk of the assizes and clerk of the Crown: that is, he is the clerk of the assizes as to those things which relate to civil suits, and clerk of the Crown as to those things which relate to the Crown. It is not material to consider in what relation this officer stood to the Custos, whether he is his deputy or his clerk, or the clerk to the body of justices, for whom the Custos keeps the rolls and records; but the question is, in whom is the right of appointment? He cannot be considered as the deputy of the Custos in the legal sense of the word, because a deputy may perform all the duties of the principal, which the Clerk of the Peace cannot.

Besides the case of *Harcourt v. Fox*, there is the case of *Saunders v. Owen*.<sup>\*</sup> That was an assize of *novel disseisin* of the office of Clerk of the Peace. The case turned upon the manner of the appointment, because at that time there was no doubt about the right of the Custos to appoint. In the report of the case in Salkeld, the Court say that it always belonged to the Custos Rotulorum to nominate the Clerk of the Peace, but the Clerk of the Peace was removable whenever the Custos Rotulorum was removed or changed, and, moreover, was

<sup>\*</sup> Salk. 467. 5 Mod. 386. 1st Ld. Raym. 158. Carth. 426.

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removable at the will of the Custos till the 32nd of Henry 8th, which makes him to continue *in quousque* the Custos shall continue in. This, therefore, is a declaration of the Court as to the original right of the Custos, and also considers that the effect of the statute of the 37th of Henry 8th, only altered the period of the duration of the office. In Jenkins\* it is stated, that the Custos Rotulorum appoints the Clerk of the Peace.

In *the King v. Evans*† the Custos Rotulorum having been displaced, the Clerk of the Peace refused to deliver the rolls to the new Custos; he was indicted and found guilty, and removed from his office and brought a *mandamus* to be restored. It was said that he was a ministerial officer to the Custos, and ought to deliver the records to him at the end of the session. The Chief Justice says, “The Clerk of the Peace ought to make out all the process which cannot be done without the rolls. When they are completed, he must deliver them to the Custos, but so long as they are in process they are to be with the Clerk of the Peace;” and, therefore, it seemed reasonable that the Defendant should be restored; but three judges were of a contrary opinion. This case does not seem to prove much either way as to the right of appointment, but only as to the conduct of the Clerk of the Peace, and that the Custos might require the rolls to be delivered to himself, if he thought fit, of which there could be no doubt. In the same case, as reported in 12 Modern Reports, Holt says, “the custody of the rolls belongs to the

\* Cent. 216, fo. 59. † 4 Mod. 31. 1 Show. 282. 12 Mod. 13.

“ Custos Rotulorum. The Clerk of the Peace is  
 “ a distinct officer, and not a mere servant.” A  
 peremptory *mandamus* was ordered.

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Then it is material to consider, whether the statute of the 37th of Henry 8th, cap. 1, throws any light upon the subject. It begins, “ Where, “ before this time, the Lord Chancellor of England, “ for the time being, hath, by reason of his office “ of the Chancery, the nomination and “ appointment of the Custos Rotulorum, and “ that in like manner all and every person which “ hath had and enjoyed the said office of the “ Custos Rotulorum hath had, until now of late, “ the nomination and appointment of the Clerk “ of the Peace: And whereas now of late “ divers and sundry persons, not being learned, “ nor being able for lack of knowledge, to exercise the offices of Custos Rotulorum and Clerk “ of the Peace, have of late years, by labour, “ friendship, and other means, attained and gotten “ for term of their lives, of the King’s Majesty, “ several grants, by his Highness’s Letters patent “ to them made, of the said Clerkships of the “ Peace;” and then it goes on to enact how the appointments to these offices shall be made in future, and as to the Clerk of the Peace, that he shall be appointed by the Custos. Further acts of Parliament have since been passed as to these offices, but they are not material to the present enquiry. This recital then appears to contain a direct recognition of the right of the Custos Rotulorum to appoint the Clerk of the Peace. It says, that the Custos hath had, until now of late, the nomination and appointment. That must

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mean the lawful and rightful nomination and appointment, and then it goes on to give the Custos a distinct power of appointment to the office, to be held as long as he should continue Custos.

It may however be said, that this act cannot be taken to recognize any pre-existing right in the Custos, because it says that the Lord Chancellor had, by virtue of his office, the nomination and appointment of the Custos, and which he had not by law. I admit that he had it not by law. The only way to account for this recital in the act is, that in point of fact, he had exercised the right, and which he probably had done, because he made out the commission; and he might consider that it was proper for him to direct who were to keep the records. But at all events, there is a parliamentary recognition that the Crown had not appointed the Clerk of the Peace, at the first formation of the Court of the Justices, because it says, that the Custos Rotulorum had until now of late appointed the Clerk of the Peace; and that now of late, persons had got grants from the Crown; and of course, it follows, that at the first formation, the Crown had not exercised the right, and that being so, the title of the Crown cannot be supported; and then it becomes a question, whether the nomination be in the Justices at large, or in the Custos Rotulorum.

It may be said there are a great many offices in Courts of Justice, where the power of nomination is not as is contended for by the Plaintiff in error. No doubt many are in the Crown, as to which, I consider that the right of nomination was reserved by the Crown, at the original formation of the Court. In others, it is in the Chief Justice; and

as to them, I consider that the right of the Chief Justice is founded in prescription, which has taken it away from the Court at large. There are many which are appointed by the Chief Officer, but these are subordinate officers or clerks, who are appointed by the superior officers.

In *Skrogges v. Coleshill*,\* it appears that the office of Exigenter became vacant in 1558, and afterwards Sir Richard Brooke, Chief Justice of the Common Pleas died, and during the vacancy of both offices Queen Mary granted the office of Exigenter to Coleshill, and afterwards granted the office of Chief Justice to Anthony Brown, who refused to admit Coleshill, and granted the office to Skrogges; and then in 1st and 2d Elizabeth, the right of the parties were discussed, and it was held by the Judges present, viz. the Judges of the King's Bench and the Chief Baron, (the Judges of the Common Pleas being excluded), that the title of Coleshill was null, and that the gift of the office by no means, and at no time, belongs or can belong to the Queen, but is only in the disposal of the Chief Justice for the time being, as an inseparable incident belonging to the person of the Chief Justice, by reason of prescription and usage. At the end of the case, a reference is made to the statute of Westminster, and it then goes on thus: "and so it seems in reason that the Justices were before the clerks, and made clerks at their pleasure." In this case, the title of the Chief Justice stands upon usage and prescription, and very properly so, because by the Common Law, the right to appoint

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the officers of the Court, was in all the Judges of the Court, and the Chief Justice alone, could only appoint by usage and prescription. But the case is important in this point of view, that it says the gift of the office by no means, and at no time, belongs or can belong to the queen; and the question then I apprehend was between the right of the whole Court and the right of the Chief Justice, which latter could only be founded on prescription.

The next case to that of Skrogges is in *Dyer* 176 a,\* by which it appears, that the office of Chirographer, and of Custos Brevium in the Common Pleas, both belong to the king.

The next cases are *Duchess of Grafton v. Holt*,† and *Bridgman v. Holt*.‡ In these cases, the question was between the Crown and the Chief Justice of the King's Bench, as to the right of appointing the chief clerk of the King's Bench. The Chief Justice claimed the right by prescription; and one question was, whether the prescription was interrupted by an act of Parliament of 15th Edward the 3d.? But the right of the Chief Justice was put on the point of prescription, and not upon the Common Law right, for that would have given it to the whole Court.

Another question is, whether this right of nomination is not a matter of fact, to be decided by a Jury, rather than a matter of Law? But I think it is a question of mere Law, for the reasons I have given. The only thing that could be considered as a matter of fact, to be tried by a

\* Kirkham's Case.

† Skinner 354.

‡ Shower's Parliamentary Cases 111.

Jury, would be, whether the Crown had reserved the right of nominating the Clerk of the Justices, or whatever he may be called, at the time, when the first commission issued for appointing Justices of the Peace? and I think that Courts of Law may take judicial notice that the Crown did not do so, from a total absence of any thing appearing to countenance such a supposition, and from the language of the statute of 37 Henry 8, where such exercise in fact is distinctly negatived, and from the various authorities which I have referred to, as to the office in question, in none of which is it in any way supposed that the Crown did exercise such a right in the first instance. It may be said, that in the Counties Palatine, a different rule prevails; and that in the County Palatine of Lancaster, the Clerk of the Peace is not appointed by the Custos Rotulorum; and that in Durham, the Bishop does not appoint in the character of Custos Rotulorum. Whatever is done in the Counties Palatine, is not necessarily according to the rule of the Common Law. But it depends altogether on the particular constitution of each county, as it was originally formed by act of Parliament, or otherwise; and I do not consider that what has been done in Counties Palatine, can affect the general principles of the Common Law.

I am therefore of opinion upon the first question, that the appointment to the office of Clerk of the Peace, within the shires of England, did by law, previously to the passing of the act 37 Henry 8, cap. 1. belong of right to the Custos Rotulorum of the shire, by virtue of his said office.

The law of Ireland before the time of Henry the

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2nd, was the Brehon Law. King John in the twelfth year of his reign, is said\* to have gone into Ireland, and there, by the advice of grave and learned men in the laws, whom he carried with him, by Parliament, to have ordained and established that Ireland should be governed by the laws of England; some of the Irish accepted, but others objected to this. In the parliament at Rithensy,† the Brehon Law was abolished. In Poyning's Law,‡ it is provided, that the English statutes before that made in England, shall be in force in Ireland.

Whatever therefore were the rights of the Crown, or other persons in England, at the formation of the Courts of Justices in England, were also the rights of the corresponding persons in Ireland. No act of Parliament in Ireland, before the year 1800, took away the right of the Custos. I am of opinion, therefore, on the second question, that the appointment of the office of Clerk of the Peace within the shires of Ireland, did by law, in and previously to the year 1800, belong of right to the Custos Rotulorum of the shire, by virtue of his said office.

The King's County was created by 3 and 4 Philip and Mary, c. 2. s. 3. A new county with all the officers attached to it, will follow the rule of all other counties; and if the Crown at the time of the original formation of the Court of the Justices in England, did not exercise the right of nomination and appointment of the officers, it could not do so in Ireland, either when the Court of Justices was

\* Co. Lit. 141, *de Communi omnium de Hibernia consensu.*

† 40 Edward 3d.

‡ 10 Henry 7th.

first formed there, or at the time of the formation of the King's County. The clause of the Act creating the King's County is as follows; " And  
 " be it also enacted, by the authorities aforesaid,  
 " that the New Fort in Offailly be from henceforth  
 " for ever called and named Phillipstown, and  
 " that the said countrie of Offailly, and such  
 " portion of the said Glinmalry as standeth, and  
 " is situated of that side of the river of Barrow,  
 " whereupon the said Phillipstown standeth and  
 " is situated; and all the segniories, honors,  
 " manors, lands, tenements and hereditaments of  
 " the same country and portion, and every of  
 " them, be from the Feast of St. Michael the  
 " Archangel, next coming after the first day of  
 " this present Parliament, one shire or countie  
 " named, known and called the King's Countie;  
 " and shall from the said Feast be taken, reputed  
 " and used as a countie or shire to all purposes  
 " for ever; and that there shall be appointed,  
 " ordayned and made, within the said countie  
 " or shire, for the rule thereof and execution of  
 " things there, sherife, coroners, escheator, clerke  
 " of the market, and other officers and ministers of  
 " justice, yearly, as in other the shires or coun-  
 " ties of this realm of Ireland be or should be."

I am therefore of opinion as to the third question, that the right to appoint to the office of Clerk of the Peace, within the King's County of Ireland, did by law in, and previously to the year 1800, belong to the Custos Rotulorum of the said shire, by virtue of his said office.

*Vaughan, B.*—With reference to the last two questions, it is to be considered as admitted that the Crown, if it ever possessed the right of

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appointment to the office of Clerk of the Peace within the shires to which these questions refer, has never parted with that right, unless it passed to the Custos Rotulorum in each county, merely by virtue and in right of his said office of Custos Rotulorum.

To the first question I answer, that the office of Clerk of the Peace, within the shires of England, did by law, previously to the passing of the act of 37 Hen. 8th, cap. 1, belong of right to the Crown. The king, by prerogative, has the creation of all powers and offices in the state, especially those connected with the administration of justice. Whoever therefore insists on the right to appoint to any such office, must to establish a legitimate claim, derive his title through the Crown. But I apprehend this may be done, first by grant from the Crown; secondly, by prescription, which presupposes such grant; thirdly, by Act of Parliament, to which the king is a consenting party.

It is not argued, nor is there colour for contending, that the office of Clerk of the Peace rests on any Act of Parliament, as its foundation prior to the 37 Hen. 8. Nor can the doctrine of prescription, in the legal acceptance of that term, assist the claim, because, neither the office of Custos Rotulorum, nor of Clerk of the Peace, had any existence before the time of legal memory. The case of the Plaintiff in error must depend therefore on the question, whether the right of the Custos to appoint can be derived from any grant mediately or immediately from the Crown; and on this ground I conceive it may be defended. When I use the words mediately or immediately, I would be understood that the right to appoint

to the office of Clerk of the Peace may be derived through the Crown by the grant of some other office, to which it may be inseparably incident; and that it did of right belong to the office of Custos Rotulorum to appoint to the office of Clerk of the Peace in England, not by virtue of any express grant from the Crown, but as incidental to the office of Custos Rotulorum, prior to the statute of 37 Hen. 8th, *accessorium sequitur principale*. It passes as an accessory to its principal.

I think that can be shown by a consideration, first, of the origin and nature of the respective offices of Custos Rotulorum and Clerk of the Peace, and of their relative duties, as arising out of and connected with the Commission of the Peace; secondly, by the strongest legislative declarations and recognitions on the subject; thirdly, by the authority of solemnly adjudged cases, some of which appear to me to be strictly analogous; and by the declarations and opinions of the most eminent judges. And, first, as to the origin (as far as it can be traced) and nature of the respective offices and their duties, as connected with the Commission of the Peace.

It is difficult to fix, with any precision, the period when any of these offices were first created. Their origin is involved in obscurity; and if the attempt to discover it, eluded the researches of the eminent judges, who must have employed many watchful hours in this enquiry, in the reign of William 3rd, (I allude to the case of *Harcourt v. Fox*) the subsequent lapse of 130 years, has only enveloped the subject in darker mystery. That the office of Custos Rotulorum is not an im-

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memorial one, must be conceded, because the Commission of the Peace which gave birth to it is within the time of legal memory; but that it is a very antient office will not be disputed. In what manner the peace was maintained in very antient times, and before the reign of Edw. 3rd, whether by persons under the name of Conservators; whether some of them, (for example) the king's justices, and inferior judges, and ministers of justice, as sheriffs, constables, tithing men, headboroughs, and the like, were *ex officio* wardens of the peace; whether others were entitled to hold the same office by tenure or prescription; whether others were elected in full County Court, in pursuance of a writ directed to the sheriff for that purpose; whether others again were occasionally appointed by a committee of the Crown; what was the extent of their authority, and what the precise limits of their jurisdiction,—are questions which it might gratify a spirit of antiquarian curiosity to investigate, but from which investigation I conceive no clear light would be reflected to guide us in our present enquiry.

Before the reign of Edward 3rd, it should seem that Commissions of the Peace were not confined within the limits of particular counties, not addressed exclusively to persons resident within them; their authority however, was restrained strictly *ad conservandam pacem*.

As soon as Edward 3rd, ascended the throne, which became vacant by the imprisonment, deposal, and murder of his father, the stat. of 1 Edw. 3rd, cap. 16, was passed, intituled, "who shall be assigned justices and keepers of the peace;" and containing this simple enactment.

“ *Item.*—For the better keeping and maintenance  
 “ of the peace, the king wills, that in every county  
 “ good men and lawful, which be no maintainers  
 “ of evil, nor barrators in the county, shall be  
 “ assigned to keep the peace.” This short and  
 general act gave very limited authority to the  
 persons to be appointed under it, making them  
 nothing more than Conservators of the Peace,  
 nominated by the Crown, in addition to those who  
 were already such by the pre-existing laws and  
 usages of the realm. Within three years after-  
 wards these justices and keepers of the peace  
 were entrusted with somewhat more enlarged  
 powers, being invested with the additional autho-  
 rity to take, but not to try indictments. The  
 statute of Edw. 3rd, cap. 2, after some regulations  
 respecting the appointment of justices of assize  
 and gaol delivery, ordained that there should be  
 assigned good and lawful men in every county to  
 keep the peace; and the justices assigned to de-  
 liver the gaols had power given them to deliver  
 the gaols of those that should be indicted before  
 the keepers of the peace; and such keepers were  
 directed for that purpose to send their indictments  
 before those justices. After this statute I find no  
 material alteration in their authority until the  
 eighteenth of the same reign, when they were to  
 be empowered by a commission from the Crown,  
 (if need should be) “ to hear and determine felo-  
 “ nies and trespasses,” 18 Edw. 3rd, cap. 2, title,  
 “ justices of the peace shall be appointed, and  
 “ their authority.” “ *Item.*—That two or three  
 “ of the best of reputation in the counties shall  
 “ be assigned keepers of the peace by the king’s  
 “ commission; and at what time need shall be,

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“ the same with other wise and learned in the land,  
“ shall be assigned by the king’s commission to  
“ hear and determine felonies and trespasses done  
“ against the peace in the same county, and to  
“ inflict punishment reasonably, according to law  
“ and reason, and the manner of the deeds.”  
When, in obedience to this statute, it was prayed  
by the Commons, in the twentieth year of the  
same reign, that they might have a power to hear  
and determine felonies; it was answered that  
the king would appoint learned persons for that  
office.

So in the twenty-first year of the same monarch,  
the Commons being charged to advise the king  
what was the best way of keeping the peace of  
the kingdom, they recommended that six persons  
in every county, of whom two were to be *de plus*  
*grounds*, two knights and two men of the land,  
and so more or less, as need should require, should  
have the power and commission out of Chancery  
to hear and determine the keeping of the peace.

In conformity with these petitions and statutes,  
and others which may be seen in Cotton’s Ex-  
tracts from records in the Tower, commissions  
were at various times framed, assigning certain  
persons to execute the powers which the statutes  
authorized the king to confer; in which, in ad-  
dition to the general powers for keeping the peace,  
a special charge was introduced to enforce the  
observance also of particular statutes, *viz.* statutes  
of Winton, 2 Edw. 3rd, and the statute of Nor-  
thampton, 20 Edw. 3rd, with some others; but  
the general standing authority given to the jus-  
tices to hear and determine felonies and trespasses,  
thereby constituting them complete judges of a

Court of Record, was not conferred upon them until the 34 Edw. 3rd, cap. 1, and I conceive that statute gave occasion to the commencement of the office of Custos Rotulorum, and the necessity of appointing an officer to make and keep the rolls or records of the peace, naturally arising out of the execution of this commission, so much enlarging their jurisdiction and powers. Observe the title and language of the statute 34 Edw. 3, cap. 1: "What sort of persons shall be justices of the peace, and what authority they shall have." The act states, first, "in every county in England shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy in the county, with some learned in the land, and they shall have power, &c. And also to hear and determine, at the king's suit, all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid."

I have endeavoured to trace the rise and progress of the growing authority and jurisdiction of the justices of the peace, with a view to ascertain whether they had power to hear and determine felonies and trespasses, until 34 Edw. 3rd, and consequently, were a Court of Record before that time; because, if I am correct in supposing that they had no such authority, there was no necessity for any such officer as Custos Rotulorum or Clerk of the Peace, nor do I believe either of them to have existed in fact prior to that period. But a Court of Record being then organized, and the justices assembled for the first time under the commission directed by that statute, I apprehend it would of right belong to them, as incident to

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the administration of justice, having records which must be in their custody, to appoint an officer, by whatever name he might be called; whether Clerk of the Crown, Clerk of the Justices, or Clerk of the Peace, to assist them in drawing their indictments, in arraigning their prisoners, in joining issues for the Crown, in entering their judgments, in awarding their process, and in making up and keeping their records.

The nature of these duties, may sufficiently account for his being sometimes called not only Clerk of the Peace, but also Clerk and Attorney for the Crown.\* Where a question arose, whether all the Justices of the Peace ought to bring their recognizances to that Justice which was Custos Rotulorum? all agreed it was good so to order it, and well done; and the Clerk of the Peace at the Sessions, is there described as Clerk of the Peace, who is Clerk and Attorney for the advantage of the King.

In *Harcourt v. Fox*, as reported in 4 Mod. 173, and in Holt's Rep. 189, the Court is reported to have affirmed, that the first beginning of a Custos Rotulorum was in the 34th year of the reign of Edw. 3; and that the reason why he was appointed at that time was, because the Justices of the Peace could not then agree among themselves, who should keep the records: and that upon application made to the King concerning the matter, his Majesty (to prevent all disputes) appointed a fit person to keep them, and gave him the custody of the records in every county. But from very careful perusal of what

\* Year Book, 2 Hen. 7. p. 31, pl. 2.

may perhaps be considered as a more full and accurate report of the same case in Shower, where the opinions of the judges are reported *seriatim*, I do not collect with certainty, that the Custos Rotulorum was nominated by the Crown, so early as in the 34th year of Edward 3. Lord Holt indeed observes, "That that statute gave occasion to the commencement of the office of Custos Rotulorum; for the justices being judges of record, the records of that Court must be in their custody. But as it might be inconvenient that the records should be dispersed amongst them promiscuously, and not kept together in one hand, it was in the power of the Crown, to appoint a particular person to have the custody and charge of them." Such is the language ascribed to Lord Holt by the report in Shower; but at what precise period of time the King first exercised that power, whether on the issuing of the first commission, after the 34 Edw. 3, or in consequence of the supposed disagreement, stated to have arisen amongst the justices themselves, does not distinctly appear in the judgments of any of the judges, and I incline to the opinion that it was not until a later period.

To hazard any conjectures on the subject is, (to adopt the phrase used in the argument of *Harcourt v. Fox*), *ambulare in tenebris*; but whatever cloud may obscure this enquiry, my researches have led me to conclude, that in a short succession of years, subsequent to the 34 Edw. 3, the King introduced the clause now found in every commission of the peace, containing a special designation of the Custos Rotulorum by name.

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This fact is manifested from several passages in Lambard, who in page 40 of his valuable work says, "That the earliest commission extant, " expressly appointing by name, the individual " to whom the custody of the records of the " peace was committed by the Crown, was in the " 14th year of the reign of Richard 2d." In mentioning the alterations made in the terms of the commission of the peace, he adds, " And " Stephen Bateman was then the first for Kent, " to whom the credit of the records of the peace " was thereby committed, which officer is now " since then called the Custos Rotulorum; all " which matters you may find in the records," " 28th of June, 14 R. 2, part 2, membrana 35."

From whence I infer, that although during the interval between 34 Edw. 3, and the 14 R. 2, comprising a period of about thirty years, the justices had generally the custody of the records, and, as incident to that custody, the appointment of any ministerial officer to assist them in that duty, (by whatever name he might be called); yet when, in progress of time, whether from differences arising between the justices themselves, or from any other cause, the Crown appointed the Custos Rotulorum by name, (a course of proceeding, which according to Lambard, obtained from the 14 Rich. 2), that appointment in any judgment, drew after it as incidental to it, the nomination of Clerk of the Peace, by reason of his possession and custody of the records. It is true, there is no mention of Clerk of the Peace, by that precise name, until some time after the statute, 12 Rich. 2, c. 10, which recognizes an officer as ministerial to the justices in the dis-

charge of their duties at the sessions, under the denomination of their clerk. The clause to which I refer, is that which directs that every of the said justices shall take for their wages four shillings the day, for the time of their sessions, and their clerk two shillings; but I conceive there is nothing in that statute to negative the presumption, that the officer therein described as Clerk of the Justices of the Peace, or by abbreviating the expression, Clerk of the Peace, the same individual officer performing the same duties, is clearly designated.

Indeed in the 13th year of the reign of Hen. 4, the reign immediately succeeding that of Rich. 2, and within twenty years of the period of time, when the Crown had introduced into the commission of the peace, the name of an individual justice as the keeper of the rolls, I find the Clerk of the Peace described in the year books; 13 H. 4, p. 10, pl. 30, as Clerk of the Sessions of the Peace; for it is there stated, that at a gaol delivery in the castle of Sarum, one of the justices, Hawkes, addressing himself to Horn, who was Clerk of the Sessions of the Peace, directed him to take down the name of the prisoner, who was not then indicted, that he might be enquired of at the next sessions of the peace.

I now proceed to the consideration of the question, whether there be not on the rolls of Parliament a direct legislative recognition of the rights of the Custos to appoint the Clerk of the Peace? and beg leave to refer to the statute, 37 H. 8.

In my humble judgment, the language of the statute is plainly declaratory of the right of the

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Custos by law, to appoint to the office of Clerk of the Peace; nor can I conceive that the law officers of the Crown, whose duty it was to protect the rights and interests of his Majesty, would have permitted such a preamble to have stained the rolls of Parliament, unless they had regarded the recent grants, by his highness's letters patent, of the clerkship of the peace, as an encroachment and usurpation upon the ancient legitimate right of the Custos, to appoint by virtue of his office. The immediate occasion of passing that statute, will appear from the language of the preamble:—"Whereas before this "time, the Lord Chancellor, by reason of his "office, hath had the nomination and appointment of Custos; and that in like manner, (that "is, by reason of his office, and incident thereto) "all and every person which had and enjoyed the "said office of Custos, hath had until now of "late, the nomination and appointment of Clerk "of the Peace;" then it goes on to recite the mischiefs resulting from the nomination of persons not sufficiently learned to exercise the said offices, by reason whereof, indictments for felony and murder, and other offences and misdemeanors, and the process awarded upon them have not only been frustrate and void, sometimes by negligent engrossing, by the embezzling or rasure of the same indictments, but also sundry bargains and sales have also been void, for lack of sufficient enrolment of the same.

Some of the duties of Custos Rotulorum are here enumerated; viz. the drawing the indictments for felonies and other offences; the keeping of them, and the awarding of process upon the

same; and the enrolment of bargains and sales. That these duties extend as well to the proper making, as to the keeping of the records, cannot be disputed; for if the naked custody of them, without regard to their due entry and enrolment, were the only office required from the Custos or his agent, the lack of sufficient knowledge could not have been urged as the mischief which called for a remedy. From this act, therefore, I conceive the inference almost irresistible, that the Clerk of the Peace, had at all times, until recently before the passing of it, been appointed by the keeper of the records. In this opinion I am fortified by great authorities. Lambard, in commenting upon this statute, p. 378, after observing that the nomination and appointment of Clerk of the Peace, had long time belonged to the Custos Rotulorum, adds:—"And "this office was also for a time, given by the "king's letters patent for the term of life, as that "of the Custos was, until the second stat. of 37 "H. 8, c. 1, recontinued the ancient order of "giving it by the Custos Rotulorum only."

Is it possible for language to express, in terms more clear, appropriate, and forcible, the opinion entertained by this author, that this act was declaratory of the legitimate right of the Custos to appoint, and of his sense of the usurpation of the Crown? Eyres J. in the case of *Harcourt v. Fox*, as reported in Shower,\* in discussing the several provisions of the statute 37 H. 8. expresses his opinion, that it must be regarded as a declaratory law. He expresses himself in these

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terms:—"From all which parts of this act so  
"perused, I think it must be obvious to every  
"man's understanding, that this act was but de-  
"clarative of what the law was before the making  
"of the act;" nor does it appear to me, that the  
argument of its being a declaratory law is at all  
weakened, or the right of the Custos to appoint  
the Clerk of the Peace in any manner impugned,  
by the fourth or fifth sections of the act : the first  
of which continued and confirmed all such as  
(being found when the act passed, in the actual  
possession of those offices) had derived their titles  
to them, under any letters patent or commission  
from the crown ; and the last of which, the fifth  
section reserved to the Archbishop of York, the  
Bishop of Durham, the Bishop of Ely, and every  
of their successors, the exercise of the same  
rights which they had been accustomed to enjoy.

The fourth section I think, can be regarded  
only as the confirmation of a suspicious and  
doubtful title. For if the king's right to appoint  
had been clear and unquestionable, where was  
the necessity of a special enactment to establish  
it ? Nor does the view which I have taken of the  
character of this monarch, induce me to conclude  
that he would have condescended to compromise  
an acknowledged right in the Crown, upon terms  
of continuing the then present possessors in office  
for the period of their lives. As to the fifth sec-  
tion, I am not aware that any argument has been  
founded upon the construction of this clause un-  
favorable to the right of the Custos. Those  
jurisdictions are specially excepted from the  
general provisions of the act. They may, or  
may not, have originated in similar usurpations ;

and it may have been thought expedient to confirm the Archbishop of York, the Bishop of Durham, and the Bishop of Ely, and their successors, in the exercise of all the liberties and authorities, according as they had enjoyed the same, by the seal of a parliamentary enactment.

I cannot close my observations on this subject, without remarking, that although the reign of Henry 8, has been considered as a very distinguished era in the annals of our judicial history, yet the royal prerogative was then strained, more particularly in his latter years, to a very tyrannical height, and its encroachments sanctioned (to use the language of the elegant commentator on the laws of England) by those pusillanimous Parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted, that the king's proclamations should have the force of law.

I now propose to shew by cases strictly analogous, and by the opinions and judgments of the most eminent lawyers, formed after much consideration, that the appointments of the Clerk of the Peace may properly be regarded by law, as incident to the office of Custos. Mr. Justice Gregory, in *Harcourt v. Fox*,\* says, "I do not see but that the Clerk of the Peace, being an officer relating to the execution of the law, his office must be governed by those rules, which govern other offices of the like nature." I would, therefore adopt this mode of illustrating the subject, and refer to the several offices of Clerk of Assize, of the Shire Clerk in the County

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\* 1 Shower 523.



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Court of the Sheriff, of the Exigenter in the Court of Common Pleas, and the Clerk of the Pleas in the Court of King's Bench. I would apply the reasoning by which the right to appoint to those offices was sustained, and the principle to be extracted from them, namely, that law and reason require that the Custos should appoint, to the question I am called to answer.

To take first the office of clerk of assize ; it is difficult to conceive two offices bearing a stronger resemblance to each other, than that of Clerk of Assize and Clerk of the Peace. The relation of Clerk of the Peace to the Justices at Sessions, is precisely the relation of Clerk of Assize to the Justices of Assize: they are the very indenture and counterpart, formed upon the same model, created by the same necessity, and discharging the same duties. By whom is the Clerk of Assize appointed? By the Justices of Assize. If it be said that the Justices of Assize derived their right to appoint from the provisions of the statute of Westminster, which transferred it to them from the Crown, I would answer that their right is laid in a deeper foundation, not in the statute, but in the common law. For, according to my Lord Coke, there exists a common law principle, which, without intrenching upon the prerogative of the Crown, gives to the justices of the court, the right of appointing such officers as are necessary auxiliaries to them in the discharge of their judicial functions, and for whose qualifications and fidelity they are responsible. This principle is directly recognized by Lord Coke, in his commentaries upon the statute of Westminster 2; from which, according to his opinion, the

Judges of Assize had exercised the right, long before the existence of that statute. "*Habeant de cætero omnes justiciarii de bancis in itineribus suis clericos irrotulantes omnia placita coram eis placitata, sicut antiquitus habere consueverint.*"\* "Hereby it appeareth, that the justices of courts (generally) did ever appoint their clerks; as here it is put, for example, that the justices of the benches in their circuits, had clerks that enrolled all pleas pleaded in them, as anciently they used to have, *i. e.* by common law." In the next passage he reiterates and confirms the same position, that this branch of the statute declareth it to belong to the justices, and that they had enjoyed the same of ancient time, *i. e.* by common law. Here, then, is a studious disclaimer of the statute of Westminster, as being the origin of the right, and an anxiety manifested to prevent any misconception of his clear opinion, that the appointment did of right belong, and was incident to the common law. His reasons for this opinion appear to me conclusive, and his authorities incontrovertible; "and the reason thereof is twofold: first, the law doth ever appoint those who have the greatest knowledge and skill;" secondly, he says, that the officers and clerks are but to enter, enrol, or effect that which the justices adjudge, award, or order; the insufficient doing whereof, maketh the proceeding erroneous; therefore the law (as it here appeareth) did appropriate to the justices, the making of their own clerks and officers, and so to proceed judicially by their own instruments; and this was the common law.

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\* Statute of Westminster 2d, c. 30. 2 Inst. 425.

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“ The king cannot grant the office of clerk of  
“ the shire or county clerk, (who is to enter  
“ judgments and proceedings in the county court)  
“ for that the making of the shire clerk belongeth  
“ to the sheriff of the common law ; as in Mitton’s  
“ case, it appeareth, *et sic de cæteris*, 4 Rep. 31.”  
It appears that Queen Elizabeth, by patent,  
granted the office of county clerk to Mitton  
for life, and afterwards constituted Arthur Hop-  
ton, sheriff of Somerset, who interrupted Mitton,  
claiming the appointment as incident to his office  
of sheriff, and thereupon appointed a Clerk him-  
self of the County Court. For Mitton, it was ar-  
gued that the grant was good, because the County  
Court was the Queen’s Court ; and that the Queen  
might, in her own Court, appoint a clerk to enter  
the judgments and proceedings. Secondly, that  
A. H. who was made sheriff after the patent,  
could not avoid it, for the Sheriff held his office  
only at the will of the Queen, who might deter-  
mine it at her pleasure, and the Queen had granted  
it to Mitton for life. Thirdly, precedents were  
shewn, by which it appeared that such offices had  
been granted by King Henry 8.

It was resolved by the two Chief Justices and  
all the Judges, *nullo contradicente aut reluctantæ*;  
that the patent was void in law ; that the office  
of Sheriff was an ancient office, before the Con-  
quest, of great trust and authority ; and although  
the King appointed the Sheriff *durante bene placito*,  
yet he could not determine in part, nor abridge  
him of any thing incident or appurtenant to his  
office. “ Resolved, that the County Court, and the  
“ entering of all proceedings in it, are incidental to  
“ the office of Sheriff, and therefore cannot be

“divided from it.” And Scrogg’s case, 2 Eliz. was cited. The Exigenter’s case was referred to in Dyer 175, as to the third objection.

But for general answer to all objections, it was observed, that great inconvenience would ensue to sheriffs, who are great and ancient officers and ministers of justice, if such grants are valid. For that as well the entry of all proceedings in the same Court, as the custody of the entries and rolls thereof, do belong to the office of sheriff; and if the record be embezzled, the sheriff shall answer for it; and therefore it would be full of danger and damage to sheriffs, if others should be appointed to keep the entries and rolls of the County Court, and yet the sheriff should answer for them; and therefore the sheriff shall appoint clerks under him in his County Court, for whom he shall answer at his peril. And law and reason require that the sheriff, who is a public officer and minister of justice, and who has an office of such eminence, confidence, peril, and charge, ought to have all right appertaining to his office, and to be favored in law. This is illustrated by the case of gaols; the custody of which of right belongs, and is incident to the office of sheriff, who must answer for excesses.

Mitton’s case recognizes, and was decided upon principles directly applicable to the case of the Custos Rotulorum; for it does not appear, either from the argument of counsel, or from the judgment of the Court, that the right of the sheriff, although a very ancient officer, existing before the conquest, was founded on prescription, but on the fact of his being the actual keeper of the rolls and entries of the Court, for which he was re-

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sponsible; and when it is remembered that the sheriff exercised a criminal jurisdiction, the sheriff's clerk might with propriety be considered as much the Attorney-General of the King, in joining issues for the Crown, as the Clerk of the Peace.

In addition to those cases of the Clerk of Assize, and the Clerk of the Sheriff's Court, which appear to be strictly analogous, I would mention the Exigenter's case, *Scroggs v. Coleshill*,\* for the principle on which it was decided; viz. that the title of Coleshill was null, and that the gift of the office at no time belonged to the Queen, but was at the disposal of the Chief Justice, for the time being, as an inseparable incident belonging to him, and this by reason of prescription and usage. In 1558, Queen Mary, during the vacancy of the office of Exigenter, and of Chief Justice of the Common Bench, granted the Exigenter's office by patent to Coleshill: she afterwards, by patent of same date, granted the office of Chief Justice to Browne, who refused to admit Coleshill, and appointed Scroggs. Sir Nicholas Bacon was commanded by the Queen, to examine the right and title of Coleshill, and to report. He convened all the Judges of the Queen's Bench; Saunders, Chief Baron, and Gerard, Attorney-General, and Caril, Attorney of the Duchy, (all the Judges of the Common Pleas excluded) who took a clear resolution that the title of Coleshill was null, and that the gift of the office at no time belonged to the Queen, but was at the disposal of the Chief Justice, for the time being, as an inseparable incident belonging to the said Chief Justice; and this by reason of prescription and usage. Dyer,

\* Dyer *quâd supra*.

after citing the words of the statute of Westminster 2d, *Habeant de cætero omnia placita coram eis*, concludes with these words; "And so it seems in reason that the justices were before the clerks, and made clerks at their pleasure."

To this may be added, the case of *Bridgman v. Holt*,\* where the question was, whether the office of Clerk of the Pleas in the King's Bench, was grantable by the Crown, or belonged to the Chief Justice, and was granted by him? This officer was to enrol pleas between party and party only, having nothing to do with any pleas of the Crown. All the rolls and records in this office, were in the custody of the Chief Justice. All writs to certify and remove the records, were directed to the Chief Justice. From the nature of the employment, it was insisted, that in truth he was but the Chief Justice's Clerk; and further, it was shewn that for two hundred and thirty-five years, the office when void, had been granted by the Chief Justice, and enjoyed accordingly under such grants: and that in those grants were introduced these words, after the mention of the surrender to the Chief Justice:—"To whom of right it doth belong to grant that office whensoever it shall be void." This declaration by the party claiming to appoint is weak, when compared with the strong legislative recital of the right of the Custos to appoint, in the preamble of the statute of 37 H. 8.

In addition to these authorities, the case of *Harcourt v. Fox*, to which I already have had frequent occasion to refer, should never be lost sight of. It is true, the question there to be decided was, whether upon the construction of

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\* Shower's Parl. Ca. 111.

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the several acts of 37 H. 8, and the 1st of William and Mary, the office of Clerk of the Peace determined by the death or removal of the Custos ; or whether being appointed, he did not acquire under the statutes, an interest *quamdiu se bene gesserit* ?

In the decision of that question, which arose within five years after the passing of the act, it became an essential part of the enquiry, to ascertain the origin and nature of the respective offices of Custos Rotulorum and Clerk of the Peace. I cannot therefore consider the opinions delivered by Lord Holt, and the other Judges, upon this branch of the subject, as *obiter* and extra-judicial *dicta*, but bearing pertinently and directly on the point. And although it was insinuated that Lord Holt's mind had insensibly contracted a bias, from his connection with one of the litigant parties in another cause, unfavorable to the pure administration of justice, yet I am persuaded, that his spotless integrity, and high judicial character with the present age, and with posterity, will afford him an ample shield against so severe and undeserved an imputation.

The case of *Saunders v. Owen* \* followed soon afterwards, which establishes the same principles. The Court held that it always belonged to the Custos Rotulorum to nominate the Clerk of the Peace, but that he was removeable whenever the Custos was removed or changed ; and moreover, that he was removeable at the will of the Custos, until 37 Hen. 8, which continued him in office *quousque*, the Custos continued, so that he de-

\* Raymond's Rep. and Salkeld *quâ suprà*.

meaned himself in his said office justly and honestly.

The point therefore for decision was, whether the nomination by parol was sufficient, or whether it required an appointment by deed? But I am not aware that there was any dissatisfaction expressed at the decision of Lord Holt, in *Harcourt v. Fox*, which was afterwards affirmed in the House of Lords; and under these circumstances, after a careful examination of the origin (as far as I have been able to trace it) of the respective offices of Custos Rotulorum and Clerk of the Peace, and of their duties, as arising out of and connected with the commission of the peace; from the legislative declaration, and recognition of the right of the Custos Rotulorum to appoint, which, as it appears to me, is to be found on the rolls of Parliament,\* and from the accumulated weight and authority of the cases to which I have referred as analogous, and the principles to be extracted from them, my mind (with great deference to the opinion of others, from whom it may be my misfortune to differ) has arrived at the conclusion, that the appointment of the office of Clerk of the Peace within the shires of England, did, by law, previously to the passing of the act of 37 Hen. 8, belong of right to the Custos Rotulorum of the shire, by virtue of his said office.

To the second question, whether the appointment to the office of Clerk of the Peace within the shires of Ireland did by law, in and previously to the year 1800, belong of right to the Crown, or to the Custos Rotulorum of the shire, by

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\* Statute 37 Hen. 8.



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virtue of his said office, or to any and what other person or persons? I answer that I conceive it to have belonged of right to the *Custos Rotulorum* of the shire, by virtue of his office.

As early as the reign of King John, a regular code or charter of English laws was granted by that monarch, about the twelfth year of his reign, and deposited in the Exchequer of Dublin, under the king's seal, for the common benefit of the land, (as the public records express it) that is, for the common benefit of all who should acknowledge allegiance to the Crown; and for the regular and effectual execution of those laws, the king's four Courts of judicature were established upon the model of the four superior Courts of England; and a new and more ample division was then made of the king's lands of Ireland into counties, in which sheriffs and other officers were appointed, in accordance with the system of government prevailing in England. If then the office of Clerk of the Peace was incident to the office of *Custos Rotulorum* in England, it seems to me to follow as a necessary natural consequence, that the same rule must hold in Ireland; the nature of those several offices and the duties required in relation to them being the same in both countries. The various Irish acts of Parliament referred to,\* directing documents to be deposited by the Clerks of the Peace, among the records of their respective counties, and requiring them to give attested copies, appear to me strong legislative recognitions, that

\* 13 and 14 G. 3, c. 26. 23 and 24 G. 3, c. 39. 40. 35 G. 3, c. 29. 34 G. 3, c. 25. 40 G. 3, c. 80.

the appointment of the office of Clerk of the Peace in Ireland is incidental to the office of Custos. The act passed so recently as 1 G. 4, c. 27, which gives the Clerk of the Peace right to hold the office *quamdiu se bene gesserit*, shews that before that time, the appointment of Clerk of the Peace was determined by the death or removal of the Custos who appointed, and therefore furnishes a strong inference that the appointment of Clerk of the Peace in Ireland, was, by law, incident to the office of Custos before the union.

By the cases also that have been decided in Ireland, of the *King v. Fergusson*, and the *King v. Severney and Falkiner*,\* this seems to have been received, declared, and acted upon, as the law of that country.

To the third question, whether the right to appoint to the office of Clerk of the Peace within the king's county in Ireland, did, by law, in and previously to the year 1800, belong to the Crown, or to the Custos Rotulorum of the said shire, by virtue of his said office, or, &c.? I also answer, that the right to appoint to the office of Clerk of the Peace within the king's county in Ireland, did, by law, in and previously to the year 1800, belong to the Custos Rotulorum of the said shire, by virtue of his said office.

The frame of this question, has not failed to draw my attention to the consideration of any distinction, which the historical fact, that the king's county was not formed into a county until the 3d and 4th year of the reign of Philip and Mary, in the year 1556, might naturally suggest.

I do not, however, apprehend that this circum-

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\* Post, p. 216.

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stance can in any manner vary the question, having taken occasion to state in the most distinct and unqualified terms, that neither in England nor in Ireland can the right of the Custos to nominate the Clerk of the Peace be maintained upon the ground of prescription; the office of Custos Rotulorum and of Clerk of the Peace in both countries, and the very county also in Ireland to which this question more directly applies, being each and every of them created and existing only within the time of legal memory.

But the moment in which the king's county became a county, however recent its formation, I conceive that the right to appoint a Clerk of the Peace, upon the principle, and for the reasons I have before stated, as applicable to England, became *eo instanti* indispensably incident to the office of Custos Rotulorum in Ireland, there being no provision in the statute of Philip and Mary to alter the law in this respect.

Being formed upon the model of other counties, with similar officers, such as Custos Rotulorum, sheriffs, &c. their appointment would be regulated and controlled by the same laws which prevailed in the government of those counties.

When, in the reign of Henry 8, the shire of Monmouth was created by a severance and divisions of the Lordships and marches within the country or dominion of Wales, and by a union and annexation of certain portions of them thenceforth, by legislative enactment, became part and member of the new shire of Monmouth, with a Custos, sheriff, and other officers, I conceive that to the sheriff belonged the right of

appointing the shire clerk of the County Court, and to the Custos Rotulorum the right of appointing the Clerk of the Peace, as incident to his office, in the same manner as in the most ancient counties in this realm.

Conceiving therefore the decision of this last question to depend upon the same principles, in the explanation and development of which, I fear that I have drawn but too largely upon your Lordships' patient attention, in my discussion of the merits of the first question, I conclude with expressing my humble opinion, that the right to appoint to the office of Clerk of the Peace within the king's county in Ireland, did, by law, in and previously to the year 1800, belong to the Custos Rotulorum of the said shire, by virtue of his said office.

*Gaselee, J.*—As I have reason to believe that all my learned brethren who are now present, with the exception of one, will concur in the answer which has been given by my learned brother who has preceded me, to the several questions propounded by your Lordships; and as he has entered so fully and ably into the investigation of the grounds and reasons, on which he has founded those answers: I think it is not only unnecessary, but that it would be an inexcusable waste of your Lordships' time, were I to enter into any lengthened discussion upon the present occasion. I shall, therefore, content myself with saying generally upon the first of the questions, that it appears to me clearly, that the act of Parliament referred to in this case, is a declaratory act; and that upon an attentive consideration of that act, and the several authorities which have

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been cited and commented upon by my learned brother, I am of opinion, that the appointment to the office of Clerk of the Peace within the shires of England, did, by law, previously to the passing of the act of 37 Hen. 8, c. 1, belong of right to the Custos Rotulorum of the shire, by virtue of his said office.

Upon the second question, in the absence of any means of ascertaining precisely the course adopted upon the introduction of the sessions, and of the office of Custos Rotulorum, and Clerk of the Peace into Ireland, the natural presumption is, that it would be that which had been pursued in England. But it does not rest on presumption only. The two cases of the *King v. Ferguson*, and the *King v. the Justices of the Peace, of the county of Tipperary, and Frederick Falkener the Clerk of the Peace in the said county*,\* appear to me to be decisive, and to be in support of the rights of the Custos Rotulorum. It is observable, that the grant under which the Defendant in error claims, which is a grant of the office of Clerk of the Peace of the whole province of Leinster, of which the county of Longford, and also the king's county, are members, (except Kilkenny) is dated the 30th July, 1798, and that seven months after the date of that grant, the right of Ferguson to the office of Clerk of the Peace for the county of Longford was established. I am therefore of opinion, that the appointment to the office of Clerk of the Peace within the shires of Ireland, did, by law, in and previously to the year 1800, belong of right to the Custos

\* Cited in the appendix to the case of the Plaintiff in error.

Rotulorum of the shire, by virtue of his said office.

Upon the third question, I do not see any sufficient ground for making a distinction between the king's county and the other shires of Ireland. The act of Parliament constituting the king's county, does not recite any. The clause is very short; it enacts "That certain portions of land therein described, shall be one shire or county, named, known, and called the king's county, and shall be taken, reputed, and used as a county or shire, to all purposes whatsoever." It goes on to add, that "there shall be appointed, ordained, and made within the said county or shire, for the rule thereof and good order of things, three sheriffs, coroner, escheators, clerk of the market, and other officers, and ministers of justice, yearly, as in other the shires or counties of this realm of Ireland be, or should be." It might, perhaps, be sufficient to say, that the Clerk of the Peace is one of the officers and ministers of justice; but in addition to that, I would refer to the case of the county of Monmouth, as strictly analogous to the present. The statute making that an English county, says nothing of a Custos Rotulorum, yet he is appointed, and appoints the Clerk of the Peace, in the same manner as is done in other English counties. It is made an English county by the 27th Hen. 8, c. 26. I do not find that there was any Custos Rotulorum of any of the Welsh counties, until after that period. The 27th Hen. 8, c. 5, authorises the making Justices of the Peace within Chester and Wales. By 34 and 35 Hen. 8, c. 26, intituled an act for certain ordinances in

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the king's dominion, and principality of Wales, reciting that there were twelve shires in Wales, eight old ones and four new, by 27 Hen. 6, besides Monmouth; it enacts (section 53) "that in each of the twelve shires there shall be Justices of the Peace and Quorum, and also one Custos Rotulorum; that the said Justices of the Peace, Justices of Quorum, and Custos Rotulorum, shall be named and appointed by the Chancellor of England, by commission under the king's great seal of England," taking no notice of the Clerk of the Peace, who, I believe, is constantly appointed by the Custos Rotulorum, as in the English counties.

With respect to any objection which may be made, on account of the length of time, during which, it appears by this case, that the Crown have actually appointed the Clerk of the Peace in the king's county, I would merely observe, that in the case of the *King v. Falkener*, it appeared that the Crown had appointed the Clerk of the Peace for the county of Tipperary, for a very considerable period after the act of Parliament, which abolished the appointment in the Duke of Ormond, though not so long as the Crown appointed the Clerk of the Peace for this county; but notwithstanding that, the appointment was held to be in the Custos Rotulorum.

On these grounds, I state it to your Lordships, as my humble opinion, that the right to appoint to the office of Clerk of the Peace within the king's county in Ireland, did, by law, in and previously to the year 1800, belong to the Custos Rotulorum of the said shire, by virtue of his said office.

*Bayley, J.*—I regret extremely, that I cannot bring myself to concur in the opinion, which the other Judges have formed in this case. The first question proposed by your Lordships to our consideration is this: Whether the appointment to the office of Clerk of the Peace within the shires of England, did, by law, previously to the passing of the act of 37 Hen. 8, c. 1, belong of right to the Crown, or to the Custos Rotulorum of the shire, by virtue of his said office, or to any and to what other person or persons? I have the misfortune to think it of right belonged to the Crown, if the Crown reserved it to itself; that it belonged to any other person or persons, (at least if named in the commission of the peace) upon whom the Crown chose to confer it, if the Crown thought fit to give it away; or that if the Crown did not think fit to reserve or confer it, it belonged of right to the Justices at large in Quarter Sessions assembled. Your Lordships' question appears to me, to propose as a mere point of law, to whom by law the right belonged? and my answer is framed upon that view of the question. I do not say, therefore, that the Crown did not in fact confer this right upon the Custos Rotulorum; all I say is, that unless it did so confer it, the Custos has it not.

The Courts of Sessions of the Peace originated, I apprehend, in the reign of Edw. 3, and were founded upon commissions issued in pursuance either of 18 Edw. 3, stat. 2, c. 1, or of 34 Edw. 3, c. 1. The former of those statutes provides, that two or three of the best reputation in the counties, shall be assigned keepers of the peace by the king's commission, and at what time need

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shall be, the same with other wise and learned in the law, shall be assigned by the king's commission, to hear and determine felonies and trespasses done against the peace in the same counties. The 34 Edw. 3, c. 1. directs that in every county of England shall be assigned for keeping the peace one Lord, (*une Seigneur*) and with him three or four of the most worthy in the county, with some learned in the law, with power to hear and determine at the king's suit, all manner of trespass done in the same county. Both these statutes are silent as to the officers and the constitution of the Court. Then, as it seems to me, a question of law arises, what could legally be done? and secondly, a question of fact, what was done? Where the Crown erects a Court of Justice of its own authority, it may, I apprehend, fix and nominate what officers it shall have, and how their successors shall be appointed; and I take it, it has the same power, where it creates a Court of Justice under the direction of Parliament; unless there be something in the act of Parliament, from which a contrary intention in the legislature may be collected; the legal presumption appears to me to be, that the legislature will break in as little as possible upon the prerogative of the Crown; and that what it does not by express words, or by necessary implication take away, it leaves in the Crown. Upon the establishment of this Court, therefore, the Crown might if it thought fit, appoint one of the Justices to be *Custos Rotulorum*, or it might omit it. It might name a Clerk of the Peace, or reserve to itself the future right of nominating the successors; or it might omit to name him, and be silent as to the

office; and then the Sessions would have the right, as incident to their being a Court to decide upon having such an officer; and the right to appoint him would either be in the Sessions, if the Crown made no other provision as to the appointment of officers, or in such other person or persons on whom the Crown had conferred the right. And whatever the Crown might do in the first instance, would either be variable upon future occasions or not. In the former case, the Crown might resume to itself the right when it thought fit; in the latter, the nomination and appointment could not have belonged to the *Custos Rotulorum*, unless he had been appointed *ab initio*.

Lambard, in his *Eirenarcha*, intimates, that there was extant in his time, one of the commissions granted in the 35th Edw. 3, and if we could discover the commissions granted at that time, and could be satisfied that the commissions for the different counties were uniform, and all of the same tenor, they might throw great light upon the question, as a question of fact, though they could not be admitted in argument upon the question of law. Suppose those commissions to have been silent as to the *Custos*, and to have reserved to the Crown the right of appointing a Clerk to the Justices, can there be a doubt but that such right would have been well reserved? Suppose the commissions to have nominated a *Custos*, and to have given him the power *pro hac vice*, to nominate the Clerk of the Peace, would not that have been a valid gift, and would it have been valid for more than that turn? Would it not equally have been valid, had the nomination been given to the Jus-

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tices at large, though it had appointed one in particular to be Custos Rotulorum? Suppose it to have nominated no Custos, and to have been silent as to the Clerk of the Peace, would not the Justices in Sessions, that is the Court, have had the power to nominate such Clerk? Such power according to Rolle,\* is incident to every Court. Suppose the commissions for different counties to have varied, or suppose them to have varied at different times, what would then have been the case? That they did vary as to the county palatine of Lancaster is clear, from the exception in the statute of William and Mary,† and from the modern practice; that they varied as to other places, may be collected from the exception in the statute of Hen. 8.‡ In Durham at present, the Bishop is his own Custos. The provisions in the statutes of Hen. 8, and Edw. 6,§ shew that he may make another person so; but he appoints the Clerk of the Peace for the county, without noticing his own character as Custos Rotulorum; and his grant of the office is confirmed by the Dean and Chapter of Durham. In Lancashire, Lord Derby is appointed Custos Rotulorum by the king, under the seals of the duchy and county palatine of Lancaster; and Lord Clarendon is appointed Clerk of the Peace, under the same seals; and the instrument so far from containing any expression that he is the deputy to the Custos Rotulorum, distinctly enjoins the Custos Rotulorum to permit him to exercise his office,

\* Abridgement, 426, Court F.

† 1 William and Mary, stat. 1, c. 21. ‡ 37 Hen. 8, c. 1, s. 5.

§ 37 Hen. 8, c. 3 and 4, and Edw. 6, c. 1, s. 5.

without impediment, hindrance, molestation, interruption, or denial. Let me press upon your consideration, the argument which arises from the practice in Lancashire, and other privileged places. The statute 34 Edw. 3, applies to every county in England, Lancaster therefore is included; and what is the case in the other counties in England, must be the case there. If the Custos had *ex officio* as matter of law, the right in every other county in England before the 37 Hen. 8, he must have had it there. If the king were precluded from nominating in ordinary counties, he must have been precluded there. If it would have been illegal elsewhere, it would have been equally so there.\* It was not until the 50 Edw. 3, that the county of Lancaster was erected into a county palatine in Parliament. The practice, therefore, even if it be confined to Lancashire alone, seems to establish the point, that this is a question of fact, not matter of law. If the early commissions passed immediately after the 34 Edw. 3, were before your eyes, and you were to find that many of them sanctioned the same practice as has prevailed in Lancashire, would this have no influence upon your judgment? Would it not be the foundation on which you would act?

The argument that we are at liberty to decide as matter of law, upon the right of the Custos Rotulorum to nominate, is founded on the recital in the 37 Hen. 8, cap. 1, on Lord Coke's comment† on the statute‡ of Westminster 2, and on the opinion of Lord Chief Justice Holt in *Har-*

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\* 4 Institute 204. † 2 Institute 425. ‡ 13 Edw. 1, st. 1, c. 2.

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*court v. Fox.* The recital in 37 Hen. 8, cap. 1, is that "where before this time, the Lord Chancellor hath by reason of his office, the nomination and appointment of the Custos Rotulorum; and in like manner, the Custos Rotulorum hath had until now of late, the nomination and appointment of the Clerk of the Peace, within the shire where he was Custos Rotulorum; and where now of late, sundry persons not learned, nor meet, nor able for lack of knowledge to occupy the said offices of Custos Rotulorum and Clerk of the Peace, have by labour, friendship, and means, gotten grants by the king's letters patent, of the said clerkships' of the peace;" and upon this it enacts that every Custos shall nominate the Clerk of the Peace within his shire; and the Custos and Clerk of the Peace shall execute the said offices by themselves or by sufficient and able deputy. This recital that the Custos till of late hath had the nomination, may, as it seems to me, refer to the practice as matter of fact, without referring to the right as matter of law. The recital does not state that of right he hath had, but states the fact only, that he has had; and the statute does not declare and enact, but enacts only; and it does not from beginning to end, insinuate that the patents of the Clerks of the Peace were illegal, or the grants void: on the contrary, it confirms the persons then in office, in their respective offices. If it were referring to the right as matter of law, it would, as it seems to me, go too far, and mistake the right; as the right, unless there were something to shew the contrary, would be in the Sessions, not in the Custos. I admit Lord Holt's opinion in *Harcourt v. Fox*, is very strong, that

the right of nominating the Clerk of the Peace belongs to the Custos Rotulorum of common right, by the common law of the land ; but that was not the point in judgment : it was incidental to the case under consideration. None of the other judges concur with him, and his conclusion is, “ So that now having as well as I can, given an “ account of the nature of the office of Custos, “ and the reason of his having the nomination of “ the Clerk of the Peace, I shall now give my “ particular reasons, upon which I ground my “ judgment in this case.”

I am aware that one of the main foundations for his opinion is, that the Clerk of the Peace must be trusted with the possession of the rolls, to make entries upon, and that the Custos Rotulorum would be answerable to the king and to the subject, in case of their loss ; and that it would be the most unreasonable thing in the world, that the Custos Rotulorum should be answerable for such miscarriage, unless he had the appointment. But the answer to that argument is, that if the Clerk of the Peace has the possession of the rolls, not as deputy to the Custos, but as the officer of the Court, the Custos would not be answerable to the king or to the public, in case of their loss or destruction, whilst they remained necessarily in the hands of the Clerk of the Peace ; and as to the notion of unreasonableness, that objection has applied at all times, as to the county palatine of Lancaster ; and it has applied in every county in England, since the 1st William and Mary, where a new Custos Rotulorum has been appointed in the lifetime of a preceding Clerk of the Peace, and it applied to the very

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case they were then deciding, for the decision was that the old Clerk of the Peace was entitled to continue, though the Custos who appointed him was removed, and a new Custos appointed.

Another argument he relies upon, is drawn from the practice as to the Clerk of Assize and the County Clerk in Mitton's case, and the reasons given in 2d Institute 425, for that practice; but both those offices are considered in 2d Institute, as having existed before time of legal memory, and the Crown may be excluded by time, from interfering as to ancient offices, though it is not prevented from interfering as to offices created within time of legal memory. It may be observed too, that Lord Holt speaks of the possession of the rolls by the Custos, as possession of them by all the justices,\* that he speaks of the Custos Rotulorum as the senior of the justices in Court.

It may be of some service, if I shortly notice how this power was treated by the counsel in argument, and by the other judges, and how it was again treated, when another opportunity occurred. Sir T. Powys argued that anciently the Custos was in the nomination of the Lord Keeper, and as anciently, the nomination of the Clerk of the Peace in the Custos, but that the Clerk of the Peace was not the Clerk of the Custos, but of all the justices in general, and properly the Clerk of the Sessions.† Mr. Hawler who argued for the Defendant says, that the statute of Edw. 3, makes no mention of such an office, but it was an incident. Justices would not make and draw out their own records, and in all probability, he who

\* 1 Show. Rep. 528.

† Id. 429.

is called in the statute of 3 Rich. 2, their clerk, was appointed by the justices, to do that work for them. He supposed that the Clerk of the Peace was at first the keeper of the records, but afterwards he that was most eminent among the justices was appointed Custos, and he appointed the Clerk of the Peace, his deputy or servant.\* Levinz, who was for the Plaintiff, upon the second argument says, "Should I go about to enquire into the origin of the office of Custos, I should attempt *ambulare in tenebris*."† As to the office of Clerk of the Peace, he says, "I cannot say how it was before the statute of Hen. 8. &c. Before there were justices, there were conservators, and it is likely they had their clerk to do their business, and keep their records; and it is likely this officer was in imitation of that, but I cannot directly tell how things might be, for this matter is all *in nubibus*."‡ Justice Eyre says, "We are I confess much in the dark, as to the beginning of the office of Clerk of the Peace; but the statute of William and Mary§ takes him wholly out of the power of the Custos, and subjects him to another jurisdiction, that is to the Sessions of the Peace, to which he is properly an attendant."|| Mr. Justice Gregory notices that in 2 Hen. 7, fo. 1,¶ he is called not only Clerk of the Peace, but *attornatus domini regis*, and that says he, is a proper name of office for him; for he draws the issues upon traverses, and so acts as attorney in that Court for the king.\*\* Mr. Justice Dolben is silent as to these points;

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\* 1 Show. P. C. 159. † 1 Show. Rep. 512. ‡ Id. 513.

§ 1 W. and M. (st. 1.) c. 21.

|| Id. 519.

¶ The Year Book, pl. 2.

\*\* Id. 523.



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and it is by Lord Chief Justice Holt, and by him only, that they are principally discussed.

These opinions were delivered in Trinity Term, 5 William and Mary. None of the other reporters of this case give the detailed account of Lord Holt's argument. One of the reports\* unites all the arguments of the Court, and puts it thus :—"As to the beginning of this office, we are much in the dark, for we can only make probable conjectures about, it and as to his continuance in office, it is not to be collected out of any of the law books before 37 Hen. 8. It is plain it was not an office from time immemorial, because the commission of the peace is not so. Afterwards it became necessary for one to make entries and join issues : the Custos appointed a Clerk for that purpose, who is now called the Clerk of the Peace ; and this seems very agreeable to the statute of Westminster, by which it appears, that such officers and clerks who are to enter and enrol the pleas, were always appointed by the judge or chief minister of the Court." Comberbach† only says the nomination of the Clerk of the Peace belonged to the Custos, as the most proper person.

Within five years, namely in Hilary Term, 8th and 9th William 3, whilst the opinion of Lord Holt must have been within the recollection of every judge in Westminster Hall, a question as to the office of Clerk of the Peace again arose in *Owen v. Saunders*,‡ and *Harcourt v. Fox*, was expressly referred to. The question was, whether under the statute of 1 William and Mary, a nomination

\* 4 Modern 172. † Rep. 210. ‡ 1 Lord Raymond 158.

by the Custos Rotulorum to the office of Clerk of the Peace by parol was good ? and Mr. Justice Powell, a lawyer of no mean talent and acquirements, said, " It had been objected that this Clerk of the Peace was originally but a deputy to the Custos Rotulorum, and therefore not properly an officer. But he was of opinion that he is, and was originally an officer, and not merely a deputy to the Custos Rotulorum. The statute 12, Rich. 2, cap. 10, appoints him wages, and there he is called Clerk of the Justices of the Peace, and he is in the nature of Attorney-General to the king. In 2 Hen. 7, c. 1, he is called the Clerk of the Peace."\* Lord Chief Justice Treby said, the origin of this office of Custos Rotulorum is not very clear, but in all probability the trust of the conservation of the rolls was committed to one of the justices, and then he was called Custos Rotulorum, and probably by the consent of his brethren,† he nominated the Clerk of the Peace.‡ In 12 Rich. 2, cap. 10, he is called Clerk of the Justices, and wages are appointed. The statute 2, Henry 7, cap. 1, first makes mention of the Custos Rotulorum.

In this case Justice Powell almost goes out of his way, to state that the Clerk of the Peace is not a deputy to the Custos, but an original officer ; and Lord Chief Justice Treby, notwithstanding the previous opinion of Lord Holt, intimates that the origin of the Custos Rotulorum was not very clear, and that instead of its belonging to the Custos Rotulorum of common right, and by the common law of the land, to nominate the Clerk of

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\* L. Raym. 139. ‡ Id. 163. † 13 Hen. 4, cap. 10, plac. 33.

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the Peace, he probably nominated him by consent of his brethren. The charge to the Custos Rotulorum in the ordinary commissions of the peace, and the observations as to the duties at the Sessions of the Custos Rotulorum and the Clerk of the Peace, in Lambard's Eirenarcha, deserve attention. The earliest commission I have met with, is at the commencement of Herbert's Justice, in the edition of 1547, and at the conclusion it commands "John Fitzjames that at the " days and places aforesaid, he cause to come, " writs, precepts, processes, and indictments " aforesaid, before himself and his said companions, and inspect and determine the same." In another edition of the same book, printed in 1606, there is a similar clause, except that it seems addressed to all the justices, and not to any one by name; but this may be a mistake in the text, because in the margin it is stated to be " al Custos Rotulorum," and the same book, in the form of what is called " the new commission," contains this clause, "*assignavimus denique te præ-* " *fatum Edw. H. Militem*, (not the person first " named in the commission, for the officers of state " are first named) *Custodem R. pacis nostræ in dicto* " *comitatu nostro, ac propterea tu ad dies et loca predicta* " *brevia precepta, processus et indictamenta predicta* " *coram te et dictis sociis tuis venire facias ut inspec-* " *antur, et debito modo terminentur.*"

Lambard in his Eirenarcha, speaks of Sessions, and of the officers bound to attend, and among those one is the Custos Rotulorum, who is to attend in respect of his duties, and another for his own duties, separate and distinct from those of the Custos, the Clerk of the Peace. " Two

sorts of men there are, that are the ordinary attendants at these Sessions; that is the officers of the Court and the jurors. Among the officers, the Custos Rotulorum hath worthily the first place, both for that, he is always a justice of the quorum in the commission, and among them of the quorum, a man (for the most part) especially picked out for wisdom and credit; and yet in this behalf he beareth the person of an officer, and ought to attend, &c. for the words in the commission be to him now by his proper name; "*Quod ad dies et loca predicta brevia precepta, processus et indictamenta, predicta coram te et dictis sociis tuis venire facias.*" Whereas until the 14 Richard the 2d, that charge was general to all justices, and not laid specially upon any one person in the commission, as it doth appear in the Tower by the records, which I have already vouched.\*"

By the commission in a county, the Custos Rotulorum ought to attend at the Sessions with records, &c.† "The Clerk of the Peace oweth his attendance at the Sessions also, for (omitting certain things specified) he readeth the indictments, and serveth the Court. He enrolleth the acts of the Sessions, and draweth the process, &c. (He also must deliver letters to all such as be acquitted of felony, &c.;) all which things he cannot do if he be not present; so that he is an officer to this Court, and Clerk of the Justices, as the 12th of Richard the 2d, c. 10, nameth him, and not as Mr. Marrow thought the Clerk of the Custos Rotulorum only."‡ And

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\* See Lambard 373, &c. printed in 1594. ‡ Id. 406, 7.

† Com. Dig. Justices of the Peace, D. 4.

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this as it seems to me, is the true state of the case. The Custos Rotulorum, though one of the justices, is in respect of his custody of the rolls, to attend with the rolls in the Court ; and the Clerk of the Peace, as a distinct officer of the Court, is to record upon such rolls, such acts of Court as are to be recorded ; and when he has recorded them, it is his duty to hand them over to the Custos Rotulorum, that he may keep them in safe custody, though the Clerk is entitled to have them whilst in process. In *Rex v. Evans*,\* the opinion of Lord Chief Justice Holt approaches this point, where he says the Clerk of the Peace is bound to deliver the rolls to the Custos when completed, though he is entitled to have them whilst in process. If there ever was a time when the rolls were in the custody of the justices at large, without any Custos Rotulorum, this would be the case ; and I see no reason why it should not continue to be the case, where one justice in particular was selected to be Custos Rotulorum.

My opinion, therefore, is not negatively that the right of appointing is not with the Custos Rotulorum, not that the right is affirmatively either with the king or with the Quarter Sessions ; but that the question with which of them it is, is matter of fact for the consideration of a jury ; not matter of law for the decision of a Court : and with this view, the case of *Bridgman v. Holt*,† and the state of the officers in the superior Courts exactly accord. In *Bridgman v. Holt*, the question was, whether the office of Clerk of the Pleas for enrolling pleas in the King's Bench,

\* 4 Mod. 31.

† Show. Parl. Ca. 115.

was in the king or in the chief justice? The Defendant who claimed under the Chief Justice, proved a series of grants for a period of two hundred and thirty-five years, whenever the office became void. It was treated therefore as a question of fact, not as a question of law. And what is the state of the other officers of the superior Courts, and upon what principle is it to be explained? Why does the Chief Justice of the King's Bench appoint the Custos Brevium in the King's Bench, whilst the gift of the same office in the Common Pleas is not in the Chief Justice there, but in the king or his grantee? Why are the first and third prothonotaries in the Common Pleas in the gift of the Chief Justice, and the second in the Custos Brevium? Why does the king appoint the master of the Crown office in the King's Bench, and the chirographer in the Common Pleas? Why is the office of Exigenter in the Common Pleas an inseparable incident to the person of the Chief Justice, so that a grant thereof by the king, whilst the office of Chief Justice is vacant, is null and void? Why do the three puisne Judges of the King's Bench appoint the Signer of the Bills of Middlesex? All is referable to what is mentioned as the ground of the opinion in *Scroggs v. Coleshill*,\* viz. prescription and usage; and what is the foundation of prescription and usage but a lost grant?

Upon the whole, therefore, I submit that the question in whom the right of appointing was in England before the 37 Henry 8, is matter of fact,

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\* Dyer 175.

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depending upon the commissions issued in the different counties in England, and the usages thereon; and that until such matter of fact is duly enquired into and ascertained, it cannot be answered as a question of law.

To the second question, as every observation I have made upon the first question, applies with equal force to the second, I humbly submit that it is also a question of fact, not a question of law, in whom the right in Ireland was.

The third question appears to me, to depend upon the point already noticed, viz. the right of the Crown in the commissions it first granted under the statute of Edw. 3, to reserve to itself the right of nominating to the office of Clerk of the Peace; for if the right existed when those commissions were granted, it seems to me to have existed as to this county, when a commission for this county was first granted. If the Crown had originally a right as to each county, to mould the machinery as it pleased, and to reserve to itself such nominations as it thought it behoved the public weal it should reserve, it must have had the same right as to this county, when first it became an object of consideration, as it had in every other. I am therefore of opinion upon the last question proposed by your Lordships, that the right of appointing the Clerk of the Peace in the king's county in Ireland, when the district that county comprises was first made a county, was in the Crown.

The other judges who were present concurred in the opinions delivered by *Littledale, J. Vaughan, B. and Gaselee, J.*

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*The Lord Chancellor.*—This is a writ of error from the Court of Exchequer Chamber in Ireland. The question relates to the appointment of the Clerk of the Peace in the king's county in Ireland. It was contended on the one side, that the appointment of Clerk of the Peace of the king's county in Ireland was in the Crown; on the other hand it was contended, that it belonged to the Custos Rotulorum of the county. The Court of Exchequer Chamber in Ireland, was of opinion that the appointment belonged to the Crown.

A writ of error was brought, and it was argued in this House during the last Session of Parliament. It was a case of great importance, and all the judges were assembled for the purpose of hearing the arguments, in order that your Lordships might have the benefit of their advice and assistance with respect to the subject.

The learned judges differed in opinion, and they postponed, therefore, delivering their judgments till the present Session. That difference still continued; a great majority of the judges, however, were of opinion, that the right to that appointment was in the Custos Rotulorum of the king's county, one judge only dissenting. The opinions of the learned judges were delivered at great length in this House. I had an opportunity of attending to their reasonings at the time. I have since been favored with copies of their judgments, and have had an opportunity of again considering them; and without troubling you by going over the same arguments which have been already advanced upon the subject in great detail, it may be sufficient for me to state, that I am

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satisfied that the decision of the Court below was erroneous, and that the appointment of this office is not in the Crown, but in the Custos Rotulorum. I am of that opinion upon the authorities that were cited by the learned judges, by which they fortified their opinions, and by the reasonings which they employed in support of their opinions. I therefore propose that the judgment of the Court below be reversed.

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Judgment reversed.

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## IRELAND.

(COURT OF CHANCERY.)

ROBERT BLAKENEY and CATHERINE }  
ANN BLAKENEY otherwise OWENS } *Appellants.*  
his Wife - - - - - }

THOMAS NEVILLE BAGOTT - - - *Respondent.*

An agreement for a Reversionary Lease having been obtained by an attorney from the son of his employer, who was remainder man in a settlement under which his father who had granted the existing Lease was tenant for life—On a bill for specific performance, the Court refused under the circumstances to enforce the agreement.

F. C. under a settlement executed in 1716 was tenant for life of certain lands, with a power to lease for any term not exceeding thirty-one years, remainder to his first and other sons successively in tail male. In 1745 F. C. granted to S. O. who was then acting as his attorney, a lease of lands, comprising two hundred acres of good land, Irish plantation measure, for three lives or thirty-one years, whichever should last the longest. M. C. was the only son of F. C. In 1749 M. C. by a writing indorsed upon that part of the lease of 1745, which was in the possession of S. O. in consideration of £20. agreed to ratify that lease, and on the expiration of the term, to grant a renewal for a farther term of lives, a blank being left in the agreement as to the number of lives. The agreement was not indorsed on the counterpart of the lease in the possession of F. C. and was not registered till June 1760. In May 1760 F. C. died, leaving M. C. surviving, who by deed in 1760, settled the lands in trust for himself for life; remainder to his two daughters as tenants in common. The Respondent became entitled to one moiety of the lands, as the only son of one of the daughters; and at a sale under a decree in Chancery in 1814, purchased the other moiety. At the time of the sale, it was mentioned that the lands were sold subject to the lease of 1745. S. O. died in 1780, leaving

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S. L. O. who was the last surviving life in the lease of 1745, and held the lands under the lease till his death, which took place in 1817. The Appellants claimed as devisees of S. L. O. In 1820 the Appellants filed a bill in Chancery, stating the facts above mentioned, and praying a specific performance of the agreement to grant a renewal of the lease. Held that under the circumstances, the Appellants were not entitled to such relief.

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**T**HE facts of this case as stated upon the bill and answer, and appearing by proofs in the cause, are as follows :

By indenture of marriage settlement, bearing date the 19th of July, 1716, and made between Francis Cuff, of the first part; Henry Richardson, of the second part; John Maxwell, and Robert Maxwell, of the third part; Gerald Cuff, and Edward Lucas, of the fourth part; and Michael Cuff, and Samuel Warring, of the fifth part; reciting that a marriage was then intended to be had, between the said Francis Cuff and Catherine Richardson, one of the daughters of the said Henry Richardson. Francis Cuff for the considerations therein mentioned, granted to Michael Cuff and Samuel Warring, amongst other, the lands and premises of Ballaghimurry, Shanballymore, and Gortnefahy, to hold to Michael Cuff and Samuel Warring, their heirs and assigns, to the use of Francis Cuff for life; remainder to the first and every other son of Francis Cuff on the body of Catherine Richardson, lawfully to be begotten in tail male.

By this deed it was provided, that Francis Cuff should have full power to make leases of the

lands, or any part thereof, for any term not exceeding thirty-one years in possession and not in reversion, without any fine, and at the best improved rent.

Francis Cuff, by indenture of lease, bearing date the 15th of October, 1745, demised the lands comprising two hundred acres of good land, Irish plantation measure, to Samuel Owens, for three lives, or thirty-one years, which ever should last the longest, at a rent of 40*l.* sterling yearly.

Samuel Owens at the time of obtaining the lease, resided upon the estate, and was at the time of the execution of the lease, the law agent and attorney of Francis Cuff.

By an indenture dated the 1st of February, 1749, and made between Francis Cuff and Michael Cuff, the only son and heir apparent of Francis, of the one part; and James Cuff of the other part; reciting the deed of the 19th of July, 1716, and particularly setting forth the leasing power reserved to Francis, under that deed, and that Francis Cuff was tenant for life. Francis and Michael, for the considerations therein mentioned, granted to James Cuff, his heirs and assigns, the several lands before mentioned; to hold upon the trusts therein mentioned, and among others to the use of Francis Cuff for life, with a power to charge 600*l.* for younger children.

This deed was registered in May, 1750.

By article of agreement, dated the 11th of December, 1749, written on the back of the lease of the 15th of October, 1745, Michael Cuff, in consideration of 20*l.*\* paid to him by Samuel Owens,

\* Of the sum paid there was no legal evidence; but it was assumed in the argument in the Court below, and stated in one of the reasons of the Appellant's printed case.

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covenanted to ratify the existing lease, and also to grant renewals to Samuel Owens, at the determination of the existing lease, for a further term of lives, a blank being left in the agreement as to the number of lives.

At the date of the execution of this agreement Samuel Owens continued to be the law agent of Francis, the father of Michael Cuff.

This agreement was registered on the 17th of June, 1760.

Francis Cuff remained in possession of the lands until the time of his death, in May 1760, when Michael Cuff, his son and heir at law, became entitled to the possession as a remainder man under the settlement.

Michael Cuff, by deed bearing date the 21st of July, 1760, after the birth of his only children, Catherine Ann, and Wilhelmina Cuff, conveyed the lands to Saint George Caulfield and James Cuff, Esq. in trust to the use of himself for life ; remainder to his two daughters ; to each, one undivided moiety as tenants in common, and thereby reserved to himself, and to every person to whom any estate of freehold was thereby limited, when in possession, and not in reversion, power to make leases not exceeding twenty-one years, at the best improved rent, without any fine. There was a saving in this deed, for all the leases and incumbrances then in being, and lawfully and justly made by Francis Cuff, and such as he had a good and lawful right to execute ; but no mention was made of the lease of 1745, nor of the article endorsed thereon.

This settlement was registered on the 23d July, 1760.

Michael Cuff died in the year 1763, leaving issue Catherine Ann, and Wilhelmina Cuff, who thereupon entered into, and became possessed of the lands.

By deed of settlement, bearing date the 13th of October, 1775, and made between Catherine Ann Cuff of the first part; Henry Upton, and Jane Ord, guardians of the said Catherine Ann, and Charles Walker of the second part; John Bagott of the third part; and Christopher Clarges and William Green of the fourth part; Catherine Ann Cuff, for the considerations therein mentioned, released to Christopher Clarges and William Green, her undivided moiety of the lands, upon the trusts therein expressed.

This deed was registered in the year 1775.

Upon the death of John Bagott and Catherine his wife, the father and mother of the Respondent he came into possession of their moiety of the lands, and the undivided moiety of the lands which belonged to Wilhelmina Cuff, were purchased by the Respondent at a sale in 1814, under a decree of the Court of Chancery in Ireland.

While the lands were held by Samuel Owens, under the lease of 1745, he also possessed himself of certain bogs and turbaries, the property of the Respondent, adjoining the lands.

Samuel Owens died in 1780, leaving Samuel Lea Owens, his nephew, who held the lands under the lease until his death, which happened in the year 1817.

Samuel Lea Owens was the surviving life in the lease of 1745, and upon his death, the Respon-

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dent demanded possession of the lands from the occupying tenants, which they refused to give, alleging that they withheld such possession, by direction of the daughter of Samuel Lea Owens, who had intermarried with the Appellant, Robert Blakeney, and claimed as devisee of Samuel Lea Owens, to be entitled to a renewal thereof for lives, under the article indorsed on the lease of 1745.

On the Respondent's counterpart of the lease of 1745, there was no agreement or article indorsed.

At the sale before the Master, the lease of 1745, and the claim upon the article were stated, and Wilhelmina Cuff's moiety of the lands was sold subject to the lease, but no mention was made of the article in the abstract of the title; and there was no mention of the article in the master's notes, made at the time of the sale, nor in the deed which conveyed the moiety to the Respondent.

The greater part of the estate, of which the lands in question were part, were subject to a rent charge for ever of 40*l.* per annum; and the part sold was subject to the moiety thereof.

On the 15th of December, 1820, the Appellants filed their bill in the Court of Chancery in Ireland, and thereby, amongst other things, stated the original lease, and the agreement for the renewal thereof for lives, and that they were entitled to the benefit of such renewal; and prayed that the agreement for renewal might be carried into specific execution, and that the Respondent might be compelled to execute to them, such draft of renewal, as might be approved of by one of the masters of the Court.

The Respondent put in his answer to this bill, insisting on the several facts before stated, in bar of the relief sought by the bill. Issue having been joined in the cause, it was agreed that each party should be at liberty to read and give in evidence on the hearing of the cause, the matters in the consent mentioned, and witnesses having been examined on both sides, the cause was heard; and a decree pronounced on the 22d of June, 1825, whereby it was ordered and decreed that the Appellant's bill should be dismissed.

On the 9th of July, 1825, the Appellants preferred a petition to the Court, complaining that they were aggrieved by the decree, and praying that the cause might be reheard.

On this petition, an order was made that the cause should be reheard on the first rehearing day of the then next term; and the cause having been accordingly reheard on the 8th of December, 1825, and further reheard on the 26th of January, 1826, the Court on the 17th of February, 1826, pronounced judgment thereon, and ordered that the decree should be affirmed.

The appeal was presented against this decree and the order on rehearing.

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For the Appellants, (the Plaintiffs in the suit,) on the original hearing were read, by consent, copies of the memorials of the deed of 1745, and the agreement of 1749; and also depositions of a witness, who swore that the moiety of the lands subject to the lease, were sold subject to the lease and the agreement to renew, and a passage

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from the further answer of the Defendant to the same effect.

For the Respondent, the Defendant in the suit, were read the settlement of 1716: Memorials of two deeds, one of settlement, to which Francis and Michael Cuff were parties, the other of mortgage, both dated in 1749, with indorsements shewing that Samuel Owens was the attorney of Francis Cuff: A patent for holding fairs and markets in Ballymore, with an indorsement in the hand writing of Samuel Owens,—“Owens, agent:” An account for news and advertisements, 1743-6, made out to Samuel Owens, and indorsed thus:—“Mr. Cuff paid me for news “and advertisements:” A memorial of the settlement of 1760: Deposition and survey, proving that the lands in lease measured two hundred acres, arable and pasture, and thirty acres of bog: That arable and pasture were at the time of the survey, worth on an average twenty-five shillings an acre, and the bog half a crown an acre: Depositions proving the hand writing of Samuel Owens on the patent, and the account before mentioned, and that he was a practising attorney.

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For the Appellants—*Mr. Sugden* and *Mr. Pepys*.

The question is, whether the whole is one instrument, and one equitable demise?

It appears by the settlement of 1716, that the lands were settled upon Francis Cuff for life, he having a power to lease for thirty-one years, with remainder to his issue male, which remainder vested in Michael Cuff

There is no proof that Owens was the law agent of Francis Cuff; and if it were proved, it would be immaterial, as Francis Cuff lived until May 1760, and never complained. But the question depends upon the agreement by Michael Cuff the son. There is no proof that Samuel Owens was the attorney of the son. The lease having exceeded the power, could not bind the son, except in so far as he confirmed it.

The father and son were dealing with the estate, and the son was induced to grant an extension of the lease, which was invalid.

The original lease with the indorsement was lost. It was in the possession of Kelly, a friend of the Respondent, who could not be forced to produce it. The expression in the memorial, "for the consideration therein mentioned," after such length of time is no evidence. This is not the case of an heir expectant. It is incumbent on those who impeach the lease, to shew the want of consideration. The answer states a belief that 20*l.* was the consideration. If this is the case of an heir expectant, he is dealing with his father. The rule of equity has never been applied to such a case. *Gowland v. De Faria*,\* is shaken as an authority on the doctrine of dealings with heirs expectant. The Courts now will not set aside a fair contract. It has been held that where the sale is by auction, the rule does not apply; so where the tenant for life and the remainder man join, the grant is not of a reversionary lease by an expectant heir. Here as it was preceded by the lease of 1745, and followed by the

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\* 17 Ves. 20. See *Whalley v. Whalley*, 3 Bligh's Rep. 1.

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deed of 1749, and the agreement of 1749, it must be considered as part of a family arrangement. Francis Cuff acquiesced till his death in 1760. Michael Cuff also acquiesced till 1760. Then a new right sprung up: a right to hold free from all incumbrances. All the parties acquiesce during their respective interests. The agreement is entire, and cannot be separated. It is a rule of equity, that that which is agreed to be done, shall be considered as done. The agreement therefore is a lease. It would be a fraud, if the Respondent were permitted now to refuse to execute a lease. The consideration goes to the whole agreement. If it is binding as to the lease of 1745, it must be equally so as to the agreement of 1749. Upon the purchase in 1814, there was direct notice of the agreement given to the purchaser.

The Respondent by his original answer, denies that he had notice of the agreement. By his farther answer, after exceptions allowed, he admits that the agreement by way of indorsement upon the lease was publicly stated.

*The Lord Chancellor.*—And he goes on to say, that it was further stated that the agreement was fraudulently obtained.

*Lord Mannors.*—It was relied upon in the Court below, that if the Appellant was not entitled to the lease, at least, he was entitled to the 20*l.* with interest.

*For the Appellant.*—There is no evidence whatever that the consideration was 20*l.* or any other sum. The agreement was entire, both parts standing on covenant equally.

On the death of Francis in 1760, the lessee held under the agreement of 1749, and not by

the lease of 1745, because it was void on the face of it. Since the death of Francis, the estate has belonged to Michael alone, and there has been acquiescence ever since.

*The Lord Chancellor.*—If there is nothing appearing on the memorial, it may be that there were two distinct considerations, one for the confirmation of the lease, the other for the agreement to renew.

*For the Appellant.*—That is not possible. The estate was held from 1760 to 1817, under acquiescence. Suppose the three lives had dropped early, and three new lives had been called for; it is probable that all the lives would have run out. If parties have a right to set aside an agreement, but acquiesce, a Court of equity will not relieve.

The settlement of 1760, and the exception of the leases, cannot affect the Appellants. They have nothing to do with that settlement, and it was voluntary.

No question was raised in the Court below on the point of uncertainty.

The question as to the 20*l.* is put in issue by the answer; but there is no evidence to support the allegation. It is admitted by the answer, that there was possession, and payment of rent, under the lease.

As to the purchase in 1814, possession is in equity evidence of the interest of a party. *Daniels v. Davison*.\* This rule applies in the case of collateral, *a fortiori* in case of direct notice. A purchaser buying property, takes it

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case, where father and son being respectively tenant for life and remainder-man in fee, join in a lease, it is not a dealing with an heir expectant for a reversionary lease. To this we answer, that the foundation of the argument is assumed. There is no proof of any family arrangement, of any dealing upon the subject, or that the father was even cognizant of the agreement. Such facts cannot be presumed; and the facts in proof lead to a contrary hypothesis; for the counter-part of the lease in the possession of the father, had no indorsement of the agreement, and the part which had the indorsement, was kept by Samuel Owens unregistered, until after the death of the father in 1760. The next hypothesis assumes, that the father acquiesced till his death, and the son till 1760. But in what did they acquiesce? not in the indorsed agreement. The father knew nothing of it, and the son could not remove Samuel Owens from the possession, while the original lease was subsisting, which, as the Appellants, and we admit, he confirmed by the indorsed agreement. The argument is inconsistent. If he confirmed the lease, how could he dispute the possession before the expiration of the lease? The acquiescence, if such it may be termed, was in the legal right of the lessee.

The son might indeed, before he signed the indorsement, have disputed the legality of the lease under the power, or he might have proceeded to set aside the agreement, on the ground of improvidence and inadequacy of consideration; and not having done so in due time, relief might have been refused after long delay, as to the original lease, in a suit where he was Plaintiff. But the agree-

ment to grant a new lease was distinct from the agreement to confirm the old one ; and the right to a renewal did not arise until the falling of the last life in the lease. It was then time enough to dispute that part of the agreement. It is said that on the death of the father, as he had exceeded his power in granting the lease, a new right sprung up in the son, to hold free from all incumbrances : but this is inconsistent with the assertion as to family arrangement, and the confirmation of the lease by the son. Sometimes it is supposed in the argument, that there is no proof of any consideration ; if so, the case of the Plaintiff must fail : for he comes to a Court of Equity to enforce an agreement without consideration. But then it is argued, that the consideration being indivisible, the agreement is entire, and incapable of being severed ; and that on the death of the father, the lease being void, the lessee held under the agreement or demise, as it is called. But if the son had proceeded by ejectment on the father's death, might not the lessee, supposing his conduct fair, have had relief in equity on that part of the agreement, which operated as a confirmation of the lease, postponing or waiving the other part of the agreement ?

As to the argument derived from the notice given of the agreement at the auction, that moiety of the estate was put up to sale by an incumbrancer ; but in any case, that notice could only operate to relieve the vendor from any subsequent question or cavil, as to an agreement, which in the same notice was stated to be invalid. Could such a notice have the effect to set up an agreement unfairly obtained, and unavailable in

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equity? If notice of a disputed claim turns, as it has been argued, the purchaser into a trustee for the claimant, then no estate with a limited title, can safely be brought to market. If the estate is sold absolutely subject to a lease or incumbrance, the purchaser is bound; so if the disputed claim turns out to be a fair one. That was the case in *Taylor v. Stibbert*. The fallacy of the argument lies in treating that as absolute, which is only a conditional engagement, not to insist on warranty. It is said that if the purchaser were not bound, the original equity would revive against the vendor. That original equity is now in question before the House on this appeal.

This is said not to be the case of an expectant heir bargaining for his reversion. It is, however, the case of a young man not in possession, but while he awaits the vesting of a remainder, granting a lease in reversion, for a mere nominal consideration, to the attorney of his father. Such being the respective characters of the parties to the contract, it was the peculiar duty of the attorney to preserve evidence, if it ever existed, of the fairness of the transaction. It is clear that Michael Cuff was in some way overreached or deceived. In the lease and the memorial, he is described as son and heir of the father, and the reversion is reserved to the father, his heirs and assigns. One of the lives named in the lease was that of Michael, so that as heir of his father, he could not by possibility have any benefit from the reversion. If, as from these facts it might be inferred, he was persuaded by the attorney that his father had absolute power over the property, the

consideration must have appeared ample under such persuasion.

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The following authorities were cited, besides those stated in the argument :—

Upon lapse of time—*Bonny v. Ridgard*, 1 Cox, 149; *Moth v. Attwood*, 5 Ves. 845; *Morse v. Royal*, 12 Ves. 355; *Lord Kensington v. Philipps*, D. P. MSS. and 5 Dow. p. ; *Scott v. Dunbar*.\*

\* D. P. 1826. MSS. The bill was by the assignee of an equity of redemption, against the mortgagee, &c. praying redemption, &c. The defence was that the conveyance was obtained by a steward from his employer at an inadequate price, and while he was in a state of distress, and pecuniary embarrassment. In the Court below, the bill as to redemption was dismissed with costs; but this decree was reversed on appeal to the House of Lords, principally on the ground that the transaction was not questioned, until after the lapse of thirty-eight years. Judgment, in D. P. 27th Feb. 1826. See also as to execution of power, *Commons v. Marshall*, 6 B. P. C. 168, Power reserved by grantor in a settlement, to lease for thirty-one years or three lives. Lease executed for thirty-one years or three lives, which shall last longest, held good. Sugden on Powers, 550-1, that a condition not authorised by the power annexed to the appointment, does not invalidate the appointment. As to confirmation of void leases, *Doe v. Watts*, 7 T. R. 83, acceptance of rent by remainder-man, held a confirmation of void lease granted by tenant for life. *Roe v. Prideaux*, 10 East. 158, acceptance of rent by remainder-man in tail, a confirmation of lease made, by a tenant in tail exceeding his power. As to notice, *Hall v. Smith*, 14 Ves. 426, notice of a lease is notice of all the contents, Dict. M. R. On the question of fraud and title to specific performance, *Twisleton v. Griffith*, 1 P. W. 310, sale by expectant heir at an inadequate price set aside. *Gwynn v. Heaton*, 1 B. C. C. 1, on a bill to be relieved from an unconscionable bargain, for a reversionary rent charge obtained from an expectant heir, it was set aside on terms, the rent charge to stand as security for money advanced and costs, *Nott v. Hill*, 1 Vern. 167, 2 Vern. 83, unconscionable bargain with heir expectant set aside. *Davis v. Symonds*, 1 Cox. 402,



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In the course of the argument, the following observations were made:—

*The Lord Chancellor.*—What acquiescence is there under the second part of the agreement? The agreement appears on the memorial to be severed into two parts. The consideration might be reasonable, so far as the confirmation of the lease goes, but bad as to the agreement for renewal.

*Lord Eldon.*—It appears that the Appellant states in his case, that Francis Cuff was seized in fee: if that is not correct, it appears that then Francis Cuff was tenant for life; and that Michael gave the confirmation, and agreed for the new lease while his father was living.

What is the evidence that the agreement was in consideration of a sum of money, as it is stated in the case? Taking the copy to be true, there is no statement in the memorial that the agreement was in consideration of a sum of money. How does it happen that it is differently stated in the case? Can it be for any purpose but to deceive? These Irish cases are so stated, that we never know the facts.

*The Lord Chancellor.*—It was assumed and argued below, that 20*l.* was the consideration. If

discretion of Court as to bills of specific performance, to dismiss, although they would not cancel the agreement, on a bill by the other party. *Kerneys v. Hansard*, Cooper 125, refusal to execute a hard agreement obtained from a person in distress. *Peacock v. Evans*, 16 Ves. 512, unequal bargain obtained from a person of weak capacity set aside on terms. *Gowland v. De Faria*, 17 Ves. 20. Fonbl. Eq. Note K. p. 135. 5th edit. and Cases in Marg. p. 137. See also *Whalley v. Whalley*, 3 Bli. 1, and the authorities collected in the notes.

the agreement had been registered before 1760, the father might have detected the fraud.

*Lord Eldon.*—It appears that the property was set up to auction, (not where) but it was then stated that the property was subject to a lease, and covenant in the lease for renewal.

*Lord Manners.*—It is fair to the Appellants to state, that my judgment was founded on the admission, that the consideration of the agreement was 20*l.*

*Lord Eldon.*—The lease takes no notice of any power. It is for life of Michael Cuff, &c. Owens covenants to pay 40*l.* to Francis Cuff, his heirs and assigns; and then Francis Cuff covenants for his heirs, executors, administrators, and assigns, for quiet enjoyment.

*Lord Manners.*—Upon the hearing in the Court below, I was of opinion, that this was not a case in which the Court ought to interfere to enforce a specific performance, and dismissed the bill on the grounds which I will state.\* The consideration for the renewal is not stated in the memorial, but it was admitted at the bar, that 20*l.* was the consideration for the agreement to renew the lease. It was argued by the counsel for the Appellant, that the omission to register, or the delay in registering the agreement, was immaterial; and at this distance of time, it may not be a circumstance to be much relied upon, although it is matter of suspicion. It is, however, material in this respect, that in Ireland it depends upon the registry, whether a deed, whether legal

\* His Lordship here stated the facts of the case as set forth in the text, and then proceeded as above.

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or equitable, is to have priority ; and one would have imagined, that in such a transaction between an attorney and an improvident young man, the attorney would have been anxious to get his document of title registered : to him it must have been a matter of importance.

The settlement of 1760, was executed for a valuable consideration. Under that deed the Respondent derives title to one moiety of the lands in question. The bill for the specific performance was filed in 1821. The Court thought that the Plaintiff had not made out a sufficient title, and dismissed the bill. If the case had been brought before the Court recently after the transaction, depending upon such a title, it would have been impossible, consistently with the rules of equity, to have granted relief. That a young man, an expectant heir, should be induced by his father's attorney, for a consideration of 20*l.* to ratify a lease which was void as against him, and also for the same consideration, to grant in reversion another lease for lives undefined, imports in itself, a transaction so grossly fraudulent, that no court of equity could give its assistance to effectuate such an agreement.

Then arises the question, whether from length of time and possession, there has been an acquiescence which deprives the Respondent of his ground of defence ? As to possession, it is clear that it must be referred to the lease of 1745. Samuel Owens was in possession under that lease. The last renewed lease according to the agreement, was not to commence until the expiration of the former lease. But then it is argued here at the bar, that the agreement is one

and entire; that it must be good or bad for the whole. That was not so considered, or argued, upon the hearing in Ireland. It appeared, and was there assumed, that the agreement related to distinct matters, and had operation accordingly: one part to confirm the act of the father, the other to grant a renewal of the lease. The Court considered one part of the agreement fair and sustainable, the other invalid: that the consideration of the 20*l.* was the only circumstance connecting the two parts of the agreement. If that were the only question, and it turned upon adequacy or inadequacy of price, I might agree with the counsel for the Appellant, that the agreement must be considered as entire. But looking at the whole question, it could not be so treated; for the consideration itself was evidence of the unfairness of the transaction—a mere bribe—a gross imposition: the consideration could prove nothing but fraud. On this ground the Court proceeded as to one moiety. The same reasoning applies to the other moiety purchased in 1814. It appears that moiety was sold subject to the lease of 1745, and purchased with notice; which is supposed to have the effect of compelling the purchaser to perform the agreement. It is clear that the person who sold meant to exonerate himself, and that the party who bought had the benefit in a lower price. That may create an equity between the vendor and the purchaser, but the lessee has nothing to do with it. Upon this ground I formed my opinion, in *M'Guire v. Armstrong*.\* The case from *Vernon*† is a loose

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\* 2 Ba. and Be. 538 † *Walton v. Com. Stamford*, 2 Vern.

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note, but shews that the vendor meant to release the subject. In the case of *Earl Brooke v. Bulkeley*,\* the bill was filed [by a vendor against a purchaser, and person claiming the benefit of a lease; calling on the purchaser to execute the lease. Lord Hardwick says, "The first question "will depend on the obligation the Plaintiff was "under to renew at the time of the agreement "for the purchase; and next, on the notice "of that obligation: for if the Plaintiff was "under an obligation, either in law or equity, to "renew, and the purchaser or his agent at the "time of the purchase had notice of such obligation, the estate must be taken subject thereto." If the vendor is bound, so is the purchaser, and *vice versa*. The reasoning, therefore, as to the moiety purchased, applies equally as to the other. The question in the case in *Vesey*, was between the vendor and purchaser, who was entitled to the benefit? There is no material distinction.

If evidence was necessary, it ought to have been treasured up by Samuel Owens. The possession is accounted for, by reference to the lease of 1745. There is nothing to connect the two parts of the agreement but the single consideration of 20*l*. This is not a case for the extraordinary interference of a Court of equity. No evidence was required on the part of the Respondent, because he relied upon the unfairness of the transaction, apparent on the face of it. In the Court below, it was insisted that the 20*l*. with interest, should be repaid. Upon this question the Appellants were left to their remedy at law. The Appel-

\* 2 Ves. 498.

lants, or those under whom they claim, might have filed a bill to perpetuate testimony; and in such a case, it was highly necessary to do away all imputation which might attach upon such an agreement : this they have failed to do.

*The Lord Chancellor* then put the question, and the judgment was affirmed.

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Judgment affirmed by order, 10th June.

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## ENGLAND.

(COURT OF CHANCERY.)\*

THOMAS DUFFIELD, and EMILY  
FRANCIS his Wife, Plaintiffs in  
the Court of Chancery - - } *Appellants.*

AMELIA MARIA ELWES, FRANCIS  
CONST, GEORGE LAW, ABRA-  
HAM HENRY CHAMBERS, WIL-  
LIAM HICKS, GEORGE THOMAS  
WARREN HASTINGS DUFFIELD,  
CAROLINE DUFFIELD, MARIA  
DUFFIELD, ANNA DUFFIELD,  
SUSAN ELIZA DUFFIELD, In-  
fants, Defendants in the same  
Court, by Original and Amend-  
ed Bill - - - - - } *Respondents.*

The same Plaintiffs in the Court  
of Chancery - - - - - } *Appellants.*

ROBERT GREENHILL RUSSELL,  
Esq. GEORGE SPENCER SMITH,  
WILLIAM HICKS, and AMELIA  
MARIA his Wife, late AMELIA  
MARIA ELWES, Defendants in  
the same Court, by Supple-  
mental Bill - - - - - } *Respondents.*

The same Plaintiffs in the Court  
of Chancery - - - - - } *Appellants.*

HENRY DUFFIELD, an Infant, De-  
fendant in the same Court, by  
second Supplemental Bill - } *Respondents*

\* Report in the Court below, 2 Simon and Stuart, p. 556.

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A testator by his will, devised to trustees and their heirs, all his freehold and copyhold land at S. and also his freehold land at H. in case there should be but one son of his daughter A. who should attain the age of twenty-one years, upon trust for such son and his heirs; and in case there should be two or more sons of A. who should attain the age of twenty-one years, then in trust for the second of such sons and his heirs; and in case there should be no son of A. upon trust for such of the daughters of A. (if any) as should first attain the age of twenty-one years, &c. : and then after certain bequests of stock in trust, to pay the dividends by way of life annuities, the testator devised and bequeathed all the residue of his property, whether freehold, copyhold, or for years, money in the funds, upon mortgage or otherwise, upon security or at interest, debts of whatever other nature or kind, to the same trustees, their heirs, executors, and administrators, upon trust, to sell, get in, &c. and to apply the proceeds in payment of debts and legacies, &c. ; and as to the residue of the monies to arise by such sales, to invest the same in the public funds or real securities; and if there should be only one child of A. upon trust, to transfer or assure the funds, and the dividends, interest, and annual proceeds thereof, to such only child, at or on his attaining the age of twenty-one years, &c. ; and if there should be two or three children of A. in trust, for such two or three children, equally to be divided between them, the shares of sons to be transferred on their attaining the age of twenty-one years, &c.

The testator afterwards made a codicil to his will in these words, to the effect following :—“ Having some short time back  
 “ drawn my pen through the first fifteen lines of the sixth  
 “ sheet of my will, and being apprehensive that such rasure  
 “ not being witnessed, might lead to litigation, I declare  
 “ that the sole intention of such rasure is, to revoke that  
 “ part only of the will, whereby I direct the sale of my free-  
 “ hold property, ; and I hereby direct and appoint, that the  
 “ son of my daughter A. who shall first attain the age of  
 “ twenty-one years, shall on attaining that age change his  
 “ name to Elwes; and I give and devise to the said son of  
 “ A. on his attaining the age of twenty-one years, and  
 “ changing his name to Elwes, all my freehold property,  
 “ lands, tenements, and hereditaments, to hold to my said  
 “ grandson, his heirs, and assigns, &c.; and I do hereby



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“ratify and confirm the said will, except as before is excepted.”

Held that the will was revoked by the codicil, expressly as to the power of sale; and as to the *corpus* of the lands at S. and H. by the effect of inconsistency of devise, but that the will was unrevoked and operative in all other respects; and that under the devise by the effect of the will and codicil, no estate in the lands at S. and H. and the other freehold estates, was vested, but remained contingent upon the event of sons or daughters of the testator's daughter, according to the limitations of the will, living to attain the age of twenty-one, &c.; and that until such vesting upon such event, (or until such event should become impossible) the estate in the lands vested in the trustees, and the rents and profits were applicable according to the trusts of the will.



**G**EORGE ELWES being at the time of making his will, and until his death, seised of or well entitled to an estate of inheritance in fee simple, of and in divers freehold manors, messuages, lands and hereditaments, situate in the counties of Berks, Surrey, Middlesex, and Suffolk, and elsewhere, and also to an estate of inheritance in fee of, and in divers copyhold and customary hereditaments, situate in the counties of Berks, Essex, and Suffolk, and elsewhere; and also possessed of and well entitled to a very considerable personal estate and effects, consisting of valuable leasehold messuages and hereditaments, monies in the funds, and various other particulars; when he was of sound and disposing mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 1st day of March, 1811, and duly executed by him, and attested as by law required, to pass

freehold estates by devise; and he thereby among other things, devised and bequeathed as follows:—" I give and bequeath unto my brother " John Elwes, and Abraham Henry Chambers, " (the Respondent) and their heirs, all that " my freehold and copyhold farm and estate, " situate, lying, and being in Southwood Park, in " the county of Suffolk, which I lately purchased " from John Pytches, Esquire, (and the copyhold " part, whereof I have already surrendered to " the uses of my will;) and also all that my " freehold farm and estate at Haverhill, in the " county of Essex, to, for, and upon such trusts " as are in and by this my will expressed and " declared thereof; (that is to say) in case there " shall be but one son of my daughter Amelia " Maria Frances Duffield, by her present husband, the said Thomas Duffield, who shall " attain the age of twenty-one years, upon trust " for such son, his heirs and assigns, for ever; and " in case there shall be two or more sons of the said " Amelia Maria Frances Duffield, who shall attain " the age of twenty-one years, then in trust for " the second of such sons, his heirs and assigns " for ever; and in case there shall be no son of " the said Amelia Maria Frances Duffield, by the " said Thomas Duffield, who shall attain the age " of twenty-one years, then upon trust for such " of the daughters (if any) of the said Amelia " Maria Frances Duffield, by the said Thomas " Duffield, as shall first attain the age of twenty- " one years, or be married under that age, with " the consent of the trustees or trustee for the " time being of this my will, and the heirs and " assigns of such daughter for ever; but if

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“ there shall not be any son of the said Amelia  
 “ Maria Frances Duffield, by the said Thomas  
 “ Duffield, who shall attain the age of twenty-  
 “ one years, nor any daughter who shall attain  
 “ that age or be married, and the said Thomas  
 “ Duffield shall depart this life leaving the said  
 “ Amelia Maria Frances Duffield him surviving,  
 “ then upon such and the same trusts for the  
 “ benefit of the children, as well sons as daugh-  
 “ ters, of the said Amelia Maria Frances Duffield  
 “ by any second husband with whom she may  
 “ happen to intermarry, as are hereinbefore ex-  
 “ pressed and declared of and concerning the said  
 “ freehold and copyhold farms and estates, for  
 “ the benefit of the children of the said Amelia  
 “ Maria Frances Duffield by the said Thomas  
 “ Duffield; but if there shall not be any son of  
 “ the said Amelia Maria Frances Duffield, by  
 “ such after taken husband, who shall attain the  
 “ age of twenty-one years, nor a daughter who  
 “ shall attain that age, or be married with such  
 “ consent as aforesaid, then upon trust for my  
 “ brother John Elwes, his heirs and assigns for  
 “ ever.” And then after bequeathing certain  
 legacies, the testator devised and bequeathed as  
 follows :—“ And as to for and concerning all the  
 “ rest, residue and remainder of the property of  
 “ which I shall be possessed, or to which I shall  
 “ be entitled at the time of my decease, or  
 “ over which I have a disposing power, whether  
 “ the same consist wholly or in part of estates,  
 “ of freehold, copyhold, or for years, money in  
 “ the funds, upon mortgage, or otherwise out  
 “ upon security or at interest, debts, or of what-  
 “ ever other nature or kind the same or any part

" thereof may be, I give, devise, and bequeath  
 " the same and every part thereof, unto the said  
 " John Elwes and Abraham Henry Chambers,  
 " their heirs, executors, administrators, and as-  
 " signs, upon trust, that they the said John Elwes  
 " and Abraham Henry Chambers, or the survivor  
 " of them, or the heirs, executors, administrators,  
 " or assigns of such survivor, do and shall with  
 " all convenient speed after my decease, sell,  
 " dispose of, and convey all and singular my free-  
 " hold, copyhold, and leasehold estates, with the  
 " appurtenances, &c. ; and also do, and shall  
 " make sale of and convert into money, all such  
 " part and parts thereof, as shall consist of money  
 " out upon mortgage or other security at interest  
 " or otherwise, and also get in all debts which  
 " shall be due and owing to me at the time of my  
 " decease, in such manner as they shall think ex-  
 " pedient, &c. And I do hereby declare and  
 " direct, that the said John Elwes and Abraham  
 " Henry Chambers, and the survivor of them,  
 " his executors, administrators, and assigns, shall  
 " stand and be possessed of and interested in the  
 " monies to arise or be gotten in by the means  
 " aforesaid or otherwise, under and by virtue of  
 " this my will, in trust, in the first place, from  
 " and immediately after my decease, to satisfy  
 " and discharge all such debts, as shall be due  
 " and owing by me to any person or persons  
 " whomsoever at the time of my decease, or  
 " which shall afterwards accrue due ; and in the  
 " next place, to pay, satisfy, and discharge my  
 " funeral expences, and the expences of proving  
 " this my will ; and then to pay and discharge the  
 " several legacies and bequests which I have

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“ given or bequeathed, or shall give or bequeath  
“ by this my will, or by any codicil or codicils  
“ thereto; and after full payment and satisfaction  
“ thereof, in trust, forthwith to lay out and invest  
“ such a portion of the residue of the monies to  
“ arise and be produced by the means aforesaid,  
“ in the purchase of so much and such sum of  
“ 3 per cent. consolidated bank annuities, in the  
“ names of them the said John Elwes and Abra-  
“ ham Henry Chambers, or of the survivor of  
“ them, his executors, administrators, or as-  
“ signs, as the yearly dividends thereof will  
“ amount to the sum of 1,000*l.* of lawful money  
“ current in England; and upon trust, that they  
“ the said John Elwes and Abraham Henry  
“ Chambers, and the survivor of them, his execu-  
“ tors, administrators, and assigns, do and shall  
“ from time to time, during the natural life of my  
“ said daughter Amelia Maria Frances Duffield,  
“ pay, or cause to be paid, all the dividends of  
“ the said 3 per cent. consolidated bank annuities  
“ so to be purchased, as the same shall accrue  
“ and be received, into the proper hands of the  
“ said Amelia Maria Frances Duffield, &c. And I  
“ do hereby declare and direct, that the said 3 per  
“ cent. consolidated bank annuities so to be pur-  
“ chased as last aforesaid, shall from and after  
“ the decease of my said daughter Amelia Maria  
“ Frances Duffield, fall into and be taken as part  
“ of my said personal estate, and be disposed in  
“ manner hereinafter declared thereof: And as  
“ to for and concerning the then residue of the  
“ monies to arise and be produced by the sales  
“ hereinbefore directed to be made of my said  
“ real and personal estate, upon trust, to lay out

“ and invest the same in the purchase of parlia-  
 “ mentary stocks or funds of Great Britain, or  
 “ upon real securities at interest, in the names of  
 “ them the said John Elwes and Abraham Henry  
 “ Chambers, or of the survivor of them, his  
 “ executors, administrators, or assigns, upon the  
 “ trusts, and for the intents and purposes, and  
 “ with under and subject to the several powers,  
 “ provisoes, and declarations, hereinafter ex-  
 “ pressed; (that is to say) in case there shall be  
 “ only one child of the said Amelia Maria Fran-  
 “ ces Duffield, by the said Thomas Duffield, in  
 “ trust, that they the said John Elwes and Abra-  
 “ ham Henry Chambers, and the survivor of them,  
 “ his executors, administrators, or assigns, do  
 “ and shall pay, assign, transfer, or assure the  
 “ said stocks, funds, and securities, and the divi-  
 “ dends, interest, and annual proceeds thereof,  
 “ unto such one or only child, at or on his attain-  
 “ ing the age of twenty-one years if a son, or at  
 “ or on her attaining that age, or being married  
 “ with the consent in writing of the trustees, for  
 “ the time being of this my will if a daughter;  
 “ and in case there shall be two or three children  
 “ of the said Amelia Maria Frances Duffield, by  
 “ the said Thomas Duffield, then that they the said  
 “ John Elwes and Abraham Henry Chambers, or  
 “ the survivor of them, shall and do stand pos-  
 “ sessed of the said stocks, funds, and securities,  
 “ and the dividends, interest, and annual pro-  
 “ ceeds thereof, upon trust, for such two or three  
 “ children, equally to be divided between them  
 “ share and share alike, the share or shares of  
 “ such of them as shall be a son or sons, to be  
 “ paid, assigned, transferred, or assured to him or

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“ them, on his or their attaining the age of twenty-  
 “ one years ; and the share or shares of such of  
 “ them as shall be a daughter or daughters, to  
 “ be paid, assigned, transferred, or assured to her  
 “ or them, on her or their attaining the age of  
 “ twenty-one years, or being married with such  
 “ consent as aforesaid : And my will is, that  
 “ in case any one or more of such children;  
 “ being a son or sons, shall depart this life under  
 “ the age of twenty-one years, or being a daughter  
 “ or daughters shall depart this life under that age,  
 “ and without being married with such consent as  
 “ aforesaid, then the shares of him, her, or them  
 “ so dying, shall accrue and go to the survivors  
 “ and survivor of such children in equal shares  
 “ and proportions if more than one ; and if but  
 “ one, then the whole to such one, and be paid,  
 “ assigned, transferred, or assured to him, her,  
 “ or them, together, with, and at the same time,  
 “ as his, her, or their original share or shares are  
 “ and is by this my will directed to be paid,  
 “ assigned, transferred, or assured ; provided  
 “ always, that if any or either of such children,  
 “ being a son or sons, shall happen to depart this  
 “ life under the age of twenty-one years, having  
 “ lawful issue of his or their bodies living at the  
 “ time of his or their decease or deceases, or born  
 “ within due time thereafter, then the share or  
 “ shares of him, her, or them so dying and having  
 “ issue, shall go and belong to his or their child  
 “ or children, and shall not survive to or amongst  
 “ the others or other of such two or three child-  
 “ ren : And my will is, that in case there shall  
 “ be four or more children of the said Amelia  
 “ Maria Frances Duffield, by the said Thomas

“ Duffield, that the said John Elwes and Abra-  
 “ ham Henry Chambers, and the survivor of  
 “ them, his executors, administrators, and as-  
 “ signs, shall stand and be possessed of the said  
 “ stocks, funds, and securities, and the dividends,  
 “ interest, and annual proceeds thereof, upon  
 “ trust, in the first place to purchase with a com-  
 “ petent part thereof, or otherwise to set apart  
 “ thereout, the sum of 50,000*l*. 3 per cent.  
 “ consolidated bank annuities, and to stand pos-  
 “ sessed thereof, and of the dividends, interest,  
 “ and annual proceeds thereof, in trust, for such  
 “ son of the said Amelia Maria Frances Duffield,  
 “ by the said Thomas Duffield, who under the  
 “ trusts of a settlement now intended to be forth-  
 “ with made, shall become possessed of an estate  
 “ tail in the said manor of Marcham, and the  
 “ messuages, farms, lands, tenements, and here-  
 “ ditaments, which shall be comprised in the  
 “ same settlement; and subject to the payment  
 “ or setting apart of the said sum of 50,000*l*.  
 “ 3 per cent. consolidated bank annuities, my  
 “ will is, that the said John Elwes and Abraham  
 “ Henry Chambers, and the survivor of them,  
 “ his executors, administrators, and assigns, shall  
 “ stand and be possessed of the then residue of  
 “ the said stocks, funds, and securities, and the  
 “ dividends, interest, and annual proceeds thereof,  
 “ upon trust, for such four or more children (ex-  
 “ clusive of such son as last aforesaid) of the said  
 “ Amelia Maria Frances Duffield, equally to be  
 “ divided between them, share and share alike,  
 “ and to to be paid, assigned, transferred, or  
 “ assured to them respectively, at the same time  
 “ or times, and with such benefit of survivorship

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“ amongst them, and in such manner in all re-  
“ spects as hereinbefore directed and declared of  
“ and concerning the said stocks, funds and se-  
“ curities, and the dividends, interest, and annual  
“ proceeds thereof, in the event of there being  
“ only two or three children of the said Amelia  
“ Maria Frances Duffield, by the said Thomas  
“ Duffield. And in case the said Thomas Duf-  
“ field shall happen to depart this life, leaving  
“ the said Amelia Maria Frances Duffield him  
“ surviving, and without leaving any issue by  
“ her, or if he shall leave issue by her, and all  
“ such issue, being sons, shall depart this life  
“ under the age of twenty-one years, and without  
“ lawful issue, and being daughters, shall depart  
“ this life under that age, without having been  
“ married with such consent as aforesaid, then my  
“ will is, and I do hereby declare and direct, that  
“ the said John Elwes and Abraham Henry  
“ Chambers, and the survivor of them, his execu-  
“ tors, administrators, and assigns, shall from and  
“ after such the decease of the said Thomas  
“ Duffield, and failure of issue as aforesaid, stand  
“ and be possessed of and interested in the stocks,  
“ funds, and securities, in or on which the monies  
“ to arise and be produced from the residue of  
“ my real and personal estate hereinbefore de-  
“ vised under the trusts hereinbefore declared  
“ thereof, shall be laid out or invested, upon  
“ trust, to pay the interest, dividends, and annual  
“ proceeds thereof, from time to time, during the  
“ natural life of the said Amelia Maria Frances  
“ Duffield, to such person or persons, as she by  
“ any note in writing signed with her own hand,  
“ shall, whether covert or sole, and notwithstand-

“ ing her coverture, (but so as the same be not by  
 “ way of anticipation) appoint to receive the  
 “ same; and in default of such appointment,  
 “ then upon trust, to pay the said interest, divi-  
 “ dends, and annual proceeds, into the proper  
 “ hands of the said Amelia Maria Frances Duf-  
 “ field, for her separate and peculiar use and  
 “ benefit, not subject or liable to the debts, con-  
 “ trol, dispositions, or engagements of any hus-  
 “ band with whom she may hereafter happen to  
 “ intermarry, and for which her receipts alone shall  
 “ be good and sufficient discharges: And in case  
 “ the said Amelia Maria Frances Duffield shall  
 “ happen to marry a second husband, and there  
 “ shall be any issue of her body by such second  
 “ husband, then my will is, and I do direct, that  
 “ the said John Elwes and Abraham Henry Cham-  
 “ bers, and the survivor of them, his executors,  
 “ administrators, and assigns, shall, from and  
 “ after her decease, stand possessed of the said  
 “ stocks, funds, and securities, and the interest,  
 “ dividends, and annual proceeds thereof, upon  
 “ such and the same trusts, for the benefit of the  
 “ children of such second marriage, as are by  
 “ this my will, declared of and concerning the  
 “ said stocks, funds, securities, interest, divi-  
 “ dends, and annual proceeds, for the benefit of  
 “ the children of the said Amelia Maria Frances  
 “ Duffield, by the said Thomas Duffield. And in  
 “ case of the decease of the said Amelia Maria  
 “ Frances Duffield, without leaving any issue of  
 “ her body, who by virtue of the trusts of this  
 “ my will, shall become entitled to the said  
 “ stocks, funds, and securities, and the dividends,  
 “ interest, and annual proceeds thereof, then

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“ I give, bequeath, and dispose of the same  
“ stocks, funds, and securities, and the dividends,  
“ interest, and annual proceeds thereof, in man-  
“ ner following, (that is to say) I give the sum of  
“ 1,000*l.* &c. And as to, for, and concerning all  
“ the then residue of the said stocks, funds,  
“ and securities, and the interest, dividends, and  
“ annual proceeds thereof, I give and bequeath  
“ the same and every part thereof, unto the said  
“ John Elwes, his executors, administrators, and  
“ assigns, to and for his and their own use and  
“ benefit, and to be paid, assigned, transferred  
“ and assured to him and them accordingly.  
“ And my will further is, and I do hereby declare  
“ and direct, that the said John Elwes and  
“ Abraham Henry Chambers, and the survivor of  
“ them, his executors, administrators, and as-  
“ signs, and other the trustee and trustees, for  
“ the time being of this my will, shall by and out  
“ of the rents, issues, and profits of the said  
“ freehold and copyhold estates, by this my will  
“ first devised, and by and out of the part or share  
“ of and in the said stocks, funds, and securities,  
“ and the dividends, interest, and annual proceeds  
“ thereof, to which any child or children of the  
“ said Amelia Maria Frances Duffield, by the  
“ said Thomas Duffield, or by any after taken  
“ husband, shall be presumptively entitled, pay  
“ and apply for the maintenance and education of  
“ any such child or children, in the mean time,  
“ and until his, her, or their share or portion,  
“ shares or portions, shall become payable, such  
“ yearly sum and sums of money, as to them the  
“ said John Elwes and Abraham Henry Cham-  
“ bers, or the survivor of them, his executors or

“ administrators, or other the trustees or trustee,  
 “ for the time being of this my will, shall seem  
 “ meet, &c.” And the testator nominated and  
 appointed John Elwes and Abraham Henry  
 Chambers, joint executors of that his will, &c.

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Some time after the date and execution of the will, the testator drew two cross lines with his pen over a part of his will, which contained the trust or direction for the sale of his residuary freehold, leasehold, and copyhold estates. The testator after the date and execution of his will, and before the date and execution of the codicil after stated, purchased certain other freehold and copyhold messuages, lands, and hereditaments in fee, and was seised thereof at the respective times of making his codicil, and of his death; and he afterwards, when of sound and disposing mind, memory, and understanding, duly made and published a codicil, bearing date the 3d day of March, 1821, which was executed by him, and attested, so as to pass freehold estates by devise; and to the purport and effect following:—“ Having  
 “ some short time back drawn my pen through  
 “ the first fifteen lines of the sixth sheet of my  
 “ last will and testament, dated on or about the  
 “ 1st day of March, in the year of our Lord one  
 “ thousand eight hundred and eleven, and being  
 “ apprehensive that such rasure not being wit-  
 “ nessed might lead to litigation, I, George Elwes,  
 “ do hereby declare by this my codicil to the  
 “ said will, that the sole intention of such rasure  
 “ was, and is to revoke that part only of the  
 “ aforesaid will, whereby I direct the sale of my  
 “ freehold property, which sale I accordingly do  
 “ hereby revoke; and I do hereby direct and

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“appoint, that the son lawfully begotten of  
 “my daughter Emily Frances Duffield, who shall  
 “first attain the age of twenty-one years, shall on  
 “attaining that age change his name for that of  
 “Elwes : And I give and devise to the said son of  
 “my daughter aforesaid, on his attaining the age  
 “of twenty-one years, and changing his name to  
 “Elwes, all my freehold property, lands, tene-  
 “ments, and hereditaments, to have and to hold  
 “to him my said grandson, his heirs, and assigns,  
 “for ever: Also I give and bequeath to my wife  
 “Amelia Maria Elwes, for and during the term of  
 “her natural life, my dwelling house, situate and  
 “being on the Terrace in High Street, in the  
 “parish of Mary-le-bone ; and I also give unto  
 “my said wife, the contents of the said house:  
 “And I do hereby nominate and appoint the  
 “Reverend William Hicks, of Whittington Rec-  
 “tory, in the county of Gloucestershire, to be  
 “my executor, in the room of my late brother  
 “John Elwes, Esquire, deceased; and I do  
 “hereby ratify and confirm the aforementioned  
 “will and testament, dated as aforesaid, except  
 “as is before excepted.”

On the 2d day of September, 1821, George Elwes died, without having revoked or altered his will, save as the same was altered by the codicil, and without having altered or revoked his said codicil.

George Elwes on his death, left the Respondent Amelia Maria Elwes his widow, and the Appellant Emily Frances Duffield his daughter, and only child and heir at law, and heir according to the custom of the manors, whereof his copyhold estates were holden, and also his sole next of kin.

The Appellants had then five children ; namely the Respondent George Thomas Warren Hastings Duffield, their then only son, an infant then of the age of nine years and upwards, and four infant daughters, namely, the Respondents Caroline Duffield, Maria Duffield, Anna Duffield, and Susan Eliza Duffield, younger than their said brother.

After the death of George Elwes, the Respondent Abraham Henry Chambers, the executor named and appointed by his said will, and the Respondent William Hicks, appointed executor by the said codicil, duly proved his said will and codicil in the Prerogative Court of the Archbishop of Canterbury, and received and got in some parts of his personal estate, and of the profits and produce thereof, and had thereout paid his funeral expences, and all or most of his debts, the whole amount whereof was inconsiderable.

In 1821 a bill was filed, and afterwards amended, stating among others, the facts herein before set forth, and contending among other points, that the devises of the lands at S. and H. and the residuary freehold lands, were not vested under the will and codicil, but future and executory, and that until the events happened on which the vesting should take place, the Appellant E. F. Duffield, as heir at law, and customary heir, was entitled to the rents and profits of the lands, subject to application of such part as might be necessary for the maintenance of the presumptive devisee under the will. The bill among other things, prayed a declaration in this respect accordingly.

The several Defendants to the original and amended bill having appeared, and put in their answers, and the cause being at issue, witnesses

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were examined, and certain documentary evidence was adduced on the part of the Appellants; among other documents, the will and codicil of the testator George Elwes, were proved by the attesting witnesses.

The cause came on, and was heard before the Vice Chancellor, on the 22d, 24th, and 28th days of February, the 1st day of March, and the 9th day of April, 1823; and on the 17th day of April, 1823, the Court by decree of that date, (among other things) declared that the will of the testator George Elwes, bearing date the 1st day of March, 1811, and the codicil thereto, bearing date the 3d day of March, 1821, were well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution; and the same was ordered accordingly: and to take an account of the personal estate, &c. And it was ordered that the said master should inquire and state to the Court, what freehold and copyhold estates of inheritance the said testator was seised of at the times respectively of making his will, of making his codicil thereto, and of his death: And it was ordered, that the said master should take an account of the rents and profits of the said testator's freehold and copyhold estates, accrued since his death, and received by the Respondents Abraham Henry Chambers and William Hicks, or either of them, or by any other persons, by their or either of their order, or for their or either of their use. And it was declared, that the appointment made by the said codicil of the Respondent William Hicks to be an executor, in the room of the testator's deceased brother John Elwes, does not operate as an appointment of the

said William Hicks to be a trustee as well as executor. And it was ordered, that it should be referred to the said master, to inquire and state to the Court, what children of the marriage between the Appellants were living at the time of the death of the said testator, and whether any, and what children had been since born, and what were their respective ages. And it was ordered, that a case should be made for the opinion of the judges of the Court of King's Bench; and that the questions in such case should be, first, whether the devise of the freehold part of the estate at Southwood Park, and of the freehold farm and estate at Haverhill, contained in the will, is revoked by the codicil? Second, did the manor of Marcham pass under the residuary devise contained in the testator's will; and if it did, was such devise revoked by the codicil? Third, did the manor of Marcham pass under the codicil to the first son of the Plaintiff Emily Frances Duffield, who shall attain twenty-one years and change his name to Elwes, or to whom does the same belong? Fourth, does the estate at Withersfield and Haverhill, purchased after the testator made his will, pass under the devise in the codicil to the first son of the Plaintiff Emily Frances Duffield, who shall attain the age of twenty-one years and change his name to Elwes, or does it go to the residuary devisee, under the joint operation of the will and codicil, or does it descend to the testator's heir at law? Fifth, to whom belong the surplus rents and profits of the said copyhold estate at Southwood Park, and of the said freehold estate at the same place, and of the said freehold farm and estate at Haverhill, (if

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the devise of such estates contained in the will was not revoked by the codicil) after providing for the maintenance of the devisee thereof, until a first son of the said Plaintiff Emily Frances Duffield shall attain twenty-one years; or in failure of such son, till a daughter shall attain that age, or be married with consent according to the will? Sixth, to whom do the intermediate rents and profits of such of the testator's freehold estates as are effectually devised by his codicil, to the son of the Plaintiff Emily Frances Duffield, who shall first attain twenty-one years and change his name to Elwes, until such events take place, belong? And it was ordered, that all proper facts necessary to bring such matters in question, should be stated in the said case: And it was ordered, that it should be referred to the said master to settle the said case, if the parties differed about the same. And, &c. (declaration as to *donatio mortis causâ*.) And it was ordered, that the copyhold estates of the said testator, (other than his copyhold estate at Southwood Park) and the leasehold estates of the said testator, should be sold, with the approbation of the said master, to the best purchaser or purchasers that could be got for the same, to be allowed of by the said master: And it was ordered, that the money to arise by the said sale should be paid into the bank, with the privity of the said Accountant-General, to be there placed to the credit of this cause, as follows; viz. such part thereof as should arise by sale of the testator's said copyhold estates, to the account of monies arising by sale of the said testator's said copyhold estates, and such parts thereof as should arise by sale of the said testator's

leasehold estates, to the said account, "the testator's personal estate," subject to the further order of the Court: And, &c. (receiver :) And, &c. (reference as to maintenance of infants, &c.) And the Court reserved the consideration of the question relating to the sum of 50,000*l.* three per cent. consolidated bank annuities, and of the several questions thereinbefore directed to be sent for the opinion of the judges of His Majesty's Court of King's Bench, until the judges of the said Court should have returned their certificate; and also reserved the consideration of all other further directions, and of the subsequent costs of this suit, until after the master should have made his general report; and any of the parties were to be at liberty to apply to the said Court, as there should be occasion.

The Respondent Amelia Maria, the widow of George Elwes, on the 3d day of July, 1824, intermarried with the Respondent William Hicks. Previous to that marriage, an indenture of settlement, dated the 3d day of July, 1824, was executed, whereby all the annuities, and other property which the Respondent Amelia Maria Hicks was possessed of or entitled to, as a provision made for her by her late husband George Elwes, were assigned to the Respondents Robert Greenhill Russell, and George Spencer Smith, upon the trusts therein mentioned, for the benefit of the Respondents Amelia Maria Hicks and William Hicks. In consequence of this arrangement, the Appellants on the 2d day of August, 1824, exhibited their supplemental bill in the Court of Chancery against the Respondents Robert Greenhill Russell, George Spencer Smith,

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the Reverend William Hicks and Amelia Maria his wife, as Defendants, stating the original suit and decree, and proceedings, and the marriage of the Respondents William Hicks and Amelia Maria his wife, and the indenture of settlement made upon their marriage; and praying, that the Appellants might have the benefit of the original suit and proceedings, and that the decree and proceedings, whether by way of appeal or otherwise, might be carried on and prosecuted as well against Robert Greenhill Russell, and George Spencer Smith, as against the Respondents William Hicks and Amelia Maria his Wife, in respect of their new interests in the matters in question in the suit, and for general relief.

To this supplemental bill, the Defendants Robert Greenhill Russell, George Spencer Smith, William Hicks and Amelia Maria his wife, appeared, and put in their answers, admitting the material facts stated in the supplemental bill. The Plaintiffs entered into evidence to prove the marriage of the Defendants William Hicks and Amelia Maria his wife, and the said indenture of settlement made on that occasion. The supplemental suit came on to be heard by consent, before the Right Honourable the Master of the Rolls, on the 13th day of August, 1824, when his Lordship was pleased to order and decree, that the former decree, bearing date the 17th day of April, 1823, and the several proceedings should be carried on and prosecuted, and the accounts and inquiries thereby directed, taken and made between the said parties to the said supplemental suit, in like manner as thereby directed as to the

parties to the former suit, with directions as to costs, and taking accounts. &c.

The master made a separate report of the testator's debts and legacies, dated the 2d day of December, 1824, which was confirmed by order, dated 9th December, 1824.

On the 16th December, 1824, he made his separate report respecting the maintenance to be allowed for the infant Respondents.

By an order of the Master of the Rolls, bearing date the 18th day of December, 1824, the master's report of the 16th of the same month was confirmed; and it was ordered that the sum of 2,000*l.* a year, &c.

The payments for the maintenance of the five infant Respondents were made agreeable to the last mentioned orders.

On the 14th day of July, 1825, the Respondent Henry Duffield, another son of the Appellants, was born, who being the second living son of the Appellants, was the presumptive devisee of the Southwood Park and Haverhill estates, devised by the testator's will, and also, as a child of the Appellants, entitled to a share of the testator's residuary personal estate, and to have maintenance allowed him out of his expectant property.

The Appellants on the 9th day of December, 1825, filed a supplemental bill in the Court of Chancery, against the Respondent Henry Duffield as a Defendant, stating the original and former supplemental suits, and the decrees and proceedings had therein, &c. and the birth of the Respondent, and his claim on the matters in question; and praying that the Appellants might have the benefit of the original and former sup-

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plemental suits and proceedings; and that the decree and proceedings, whether by way of appeal or otherwise, might be carried on and prosecuted against the Respondent Henry Duffield.

To this supplemental bill, the Respondent Henry Duffield appeared, and put in his answer by his guardian, thereby claiming all such rights and interests in the testator George Elwes's real and personal estate as he was entitled to, and submitting the same to the protection of the Court. This supplemental cause came on to be heard upon bill and answer, before the Master of the Rolls, on the 17th day of December, 1825, when it was ordered and decreed, that the former decrees, bearing date the 17th April, 1823, and the 13th August, 1824, and the several proceedings, should be carried on and prosecuted, and the accounts and inquiries thereby directed, be taken and made between the parties to that supplemental suit, in like manner as thereby directed as to the parties to the former suit; and after directing the taxation and payment of the costs of that supplemental suit to that time, the consideration of all further directions, and of the subsequent costs of that suit, were reserved in like manner as the same were reserved by the former decrees; and any of the parties were to be at liberty to apply to the Court as there should be occasion.

In pursuance of the Vice Chancellor's decree of the 17th April, 1823, a case was prepared for the opinion of the judges of the Court of King's Bench; that case contained a statement of the facts, except that, to avoid the impropriety of

proposing to a Court of common law, a question concerning the devise of a mere trust estate, the ultimate limitation of the manor of Marcham, and the freehold hereditaments comprised in the indenture of settlement, of 7th October, 1802, made to George Elwes in fee, in the event of the Appellant Emily Frances Duffield marrying without his consent in writing, was described in the case to be a use capable of being executed in possession by the statute, and not a mere trust estate as the settlement makes it. The questions in the case were those directed by the Vice Chancellor's decree, as before stated.

In the sittings after Easter Term 1824, the case was argued before three of the judges of the Court of King's Bench, (in the absence of the Lord Chief Justice) who certified their opinion thereon to the Court of Chancery, as follows :—

“ This case has been argued before us by  
“ counsel. We have considered it, and are of  
“ opinion,

“ 1st. That the devise of the freehold part of  
“ the estate at Southwood Park, and of the free-  
“ hold farm and estate at Haverhill, contained in  
“ the will, is not revoked by the codicil.

“ 2d. That the manor of Marcham did pass  
“ under the residuary devise contained in the  
“ testator's will, and that such devise was revoked  
“ by the codicil.

“ 3d. That the manor of Marcham did pass  
“ under the codicil to the first son of the Plaintiff  
“ Emily Frances Duffield, who shall attain twenty-  
“ one years and change his name to Elwes.

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“ 4th. That the estate at Withersfield and  
“ Haverhill, purchased after the testator made  
“ his will, passed under the devise in the codicil  
“ to the first son of the Plaintiff Emily Frances  
“ Duffield, who shall attain twenty-one years and  
change his name to Elwes.

“ 5th. That the surplus rents and profits of  
“ the said copyhold estate at Southwood Park,  
“ and of the said freehold estate at the same  
“ place, and of the said freehold farm and estate  
“ at Haverhill, after providing for the maintenance  
“ of the devisee thereof, belong to Abraham  
“ Henry Chambers, the surviving trustee under  
“ the will of the said testator, until a first son of  
“ the Plaintiff Emily Frances Duffield shall at-  
tain twenty-one years, or in failure of such son,  
“ till a daughter shall attain that age, or be  
“ married with consent according to the will.

“ 6th. That the intermediate rents and profits  
“ of such of the testator's freehold estates, as are  
“ effectually devised by his codicil to the son of  
“ the Plaintiff Emily Frances Duffield, who shall  
“ first attain twenty-one years and change his  
“ name to Elwes, until such events take place,  
“ belong to Abraham Henry Chambers, the sur-  
viving trustee under the will of the testator.

“ *J. Bayley.*

“ *G. S. Holroyd.*

“ *J. Littledale.*”

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Upon the return of this certificate, the causes  
came on to be heard on the 26th day of April,  
1826, before the Vice Chancellor, upon further  
directions: and on the 29th day of April, 1826,

a decretal order was pronounced, whereof the declaratory and mandatory part is as follows:—

This Court doth declare, that the said certificate of the judges of the Court of King's Bench is hereby confirmed, as to their answers to the first and second questions proposed in the said case: And as to the matter of the third, fourth, fifth and sixth questions, this Court doth declare, that the equitable estate and interest of which the said testator George Elwes died seised or entitled to in the manor of Marcham, and the other freehold hereditaments comprised in the said settlements of the 7th day of October, 1802, and the 15th day of October, 1807, passed by the general devise in the said codicil of all the testator's freehold property, lands, tenements, and hereditaments.

“ And this Court doth declare, that under and  
 “ by virtue of the said will of the testator George  
 “ Elwes, the Defendant George Thomas Warren  
 “ Hastings Duffield, as the only son of the Plain-  
 “ tiff Emily Frances Duffield, by her husband the  
 “ Plaintiff Thomas Duffield, living at the tes-  
 “ tator's death, took upon the testator's death, a  
 “ presently vested equitable estate in fee, in the  
 “ testator's freehold and copyhold farm and estate  
 “ in Southwood Park, and freehold farm and  
 “ estate at Haverhill, specifically devised by his  
 “ will, subject to be divested by the death of the  
 “ said George Thomas Warren Hastings Duffield  
 “ under the age of twenty-one years, or by the  
 “ birth of a second son of the Plaintiffs: And  
 “ this Court doth declare, that upon the birth of  
 “ the Defendant Henry Duffield, the second son  
 “ of the Plaintiffs, the said equitable estate of the

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“ said George Thomas Warren Hastings Duffield  
“ was devested, and the said Henry Duffield took  
“ a vested equitable estate in fee, in the said  
“ Southwood Park and Haverhill estates, subject  
“ to be devested, in the event of the said Henry  
“ Duffield dying, or becoming neither the second  
“ nor only son of the Plaintiffs, before he attains  
“ the age of twenty-one years.” And in taking  
the account directed by the decree, of the rents  
and profits of the testator’s freehold and copy-  
hold estates accrued since his death, this Court  
doth order, that the master do distinguish which  
of such rents and profits arose from the testator’s  
freehold and copyhold farm and estate in South-  
wood Park, and his freehold farm and estate at  
Haverhill, specifically devised by his said will :  
And it is ordered, that the master do also distin-  
guish what part of the rents and profits of the  
said specifically devised estates, accrued previous  
to the birth of the Defendant Henry Duffield,  
and what part thereof has accrued since that  
time. “ And this Court doth declare, that such  
“ of the said rents and profits as accrued before  
“ the birth of the said Henry Duffield, belong to  
“ the said George Thomas Warren Hastings Duf-  
“ field, subject only to the allowance for his  
“ maintenance directed by the said will, and  
“ that such of the said rents as accrued since the  
“ birth of the said Henry Duffield, belong to the  
“ said Henry Duffield, subject only to the allow-  
“ ance for his maintenance directed by the said  
“ will.” And this Court doth declare, that the  
devise of the said testator’s residuary freehold  
estates to trustees made by his will, is wholly  
revoked by the said codicil. “ And this Court

" doth declare, that under and by virtue of the  
 " said codicil, the Defendant George Thomas  
 " Warren Hastings Duffield, the eldest son of the  
 " Plaintiff Emily Frances Duffield, upon the tes-  
 " tator's death took a presently vested legal  
 " estate in fee, in all the testator's freehold pro-  
 " perty, lands, tenements, and hereditaments,  
 " (except only the said Southwood Park and  
 " Haverhill estates, specifically devised by his  
 " said will,) subject to be divested in case of the  
 " death of the said George Thomas Warren  
 " Hastings Duffield under the age of twenty-one  
 " years, but without prejudice to the question,  
 " how far such estate may be affected in case the  
 " said Defendant George Thomas Warren Has-  
 " tings Duffield should not, on attaining his age  
 " of twenty-one years, change his name for that  
 " of Elwes: And this Court doth declare, that  
 " the rents and profits of the said freehold pro-  
 " perty devised by the said codicil, accrued since  
 " the said testator's death, belong to the said  
 " George Thomas Warren Hastings Duffield."  
 And in taking the said account directed by the  
 decree, of the rents and profits of the testator's  
 freehold and copyhold estates accrued since his  
 death, it is ordered, that the master do distinguish  
 which of such rents and profits arose from his said  
 freehold property devised by his said codicil.  
 And this Court doth declare, that the direction in  
 the said will, that the trustees thereof should  
 out of the produce of the testator's residuary  
 real and personal estates, purchase or set apart  
 the sum of 50,000*l.* 3 per cent. consolidated bank  
 annuities, is to be considered only as a charge on  
 the said residuary fund; and that the said testator

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that the second son is more entitled than the eldest? for the eldest after all may be the only son when he attains twenty-one.

You are therefore taking it away from one who may be entitled, in favor of one who may never be entitled.

The eldest son's estate can never be divested, if it be vested till a second, or some other son attains twenty-one.

But it is to be divested in the event of his becoming neither the second nor the only son.

Then is an eldest daughter to take a vested interest?

There are cases, undoubtedly, in which what has seemed to be contingent, has been held to be vested: those cases, however, have no application here. So much for the estates given by the will; now for the codicil.

Here the devise is to the first son who shall attain twenty-one, and shall change his name to Elwes. Who is here intended to take? The testator did not like the name of Duffield, and chose that his own name should go with the estate. The first son might not attain twenty-one; or he might not choose to change his name: any other son might first take the name. The reservation of the question, as to the necessity of taking the name, is avoiding the difficulty; not deciding it. Is not taking the name as much part of the description as attaining twenty-one? One is as much a branch of the description as the other. Supposing Mr. Duffield was to take the name of Elwes, and have a son born afterwards; would that son take upon his birth? It must be now decided what is the effect of that provision.

of which the Vice Chancellor has reserved the consideration?

The decisions on which this decree was founded, are not applicable: \* where there is a devise to A. if he attains twenty-one, and if not over; it has been held that the devise is immediate. The only question is, whether the condition is precedent or subsequent? The object in those cases is certain: but here it is to one of a class. You can never tell who is to answer the description. Those cases all turn upon the devise over. The other class of cases is, where the devise is to A. until B. attains twenty-one, and then to B. Those cases are cases of exception out of the gift and turn upon the adverbs of time, "when, until," &c. Suppose I devise to my first daughter who shall marry? no unmarried daughter could take.

The decision in *Grant's* case, † was represented to have been a decision that the estate was vested: but that was not so. The reason why the estate was held to be barred was, that the statute of fines enables the party to bar a possibility. There the person was in *esse*. He was ascertained and described in the will.

In the *habendum* the words when he shall attain twenty-five were omitted; yet there being no devise over, it was held that he took only a possibility. It is an express decision that upon a devise to A. when he answers a particular description, he can take nothing in the mean time. The Vice Chancellor relied on *Spring* and *Cæsar*. ‡ He said it shewed that the event being collateral, did not prevent the estate from vesting: that case

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\* *Bromfield v. Crowder, &c.* † 10 Rep. 50. ‡ 1 Roll. Abr. 415.

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really has no application to this. The decision proceeds upon the subsequent words, showing the intent against the first words. Why do you in this case give it to the first son? he does not answer the description: but he may answer the description, and therefore you give it to him. But when a second son is born you take it away: why? because he may answer the description; not because he does answer it. But he may not answer the description, and the first son may. That is the person to whom you first give it, and afterward take it away. You give it him because he may answer the description; and he may still answer the description when you take it away.\*

The King's Bench has held that the will was republished by the codicil, and passed all the interest undisposed of expressly by the codicil; but the trusts upon which the property was devised to the trustees were revoked: and the will contained an express devise of all the estates to other purposes. How then can it operate as a republication for this purpose? But it is not material to argue this question, for the King's Bench has only decided what is the legal devise, leaving the beneficial interest undisposed of. Now the trusts being revoked by the codicil, the rents remain undisposed of.

With respect to the declaration of right by the Vice Chancellor, he has reserved one of the principal questions, which ought to have influenced his decision. He has reserved the question as to the effect of the devisee not taking the name of Elwes; so that he is to take the estate, leaving

\* *Driver v. Frank*, 3 M. and S. 25. 6 Pri. 46. 3 Tau. 571.

it in doubt whether he will ever answer the description.

With respect to the Southwood and Haverhill lands, the estate is given to the eldest son; why? because he answered the description? no, he did not answer it, but he might answer it. Then the estate is taken from the first son, to give it to the second: why? because he answered the description? no, but because he may. Then suppose the second son dies, is the first son to take the estate again?

*Lord Eldon.*—The maintenance is out of the estate, to which the son is *presumptively* entitled, not to which he is entitled. I take it a person is said to be presumptively entitled to that to which he is not actually entitled, but may become entitled.

*For the Appellants.*—The question which is reserved, is a part of the description. What is the construction of the will, if the estate is to go to daughters? Is a daughter to take whether she marries or not, or marries with or without consent? so that this construction totally defeats the intention; and it is equally against the rules of law and the decisions. *Grant's* case cited in *Lampet's* case.\* It was said that the decision in *Grant's* case, proceeded upon the ground that the estate was vested; had it been vested, there would have been no question. There is a case, in which it has been held, that a devise to A. at twenty-one without more is not executed. All the cases are where there is either an intermediate estate or a devise over. *Boraston's* case is of the first class. It was held that the word “when,” had merely

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\* 10 Rep. 51.

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relation to the preceding estate. They are mere adverbs of time, and not of contingency. Nobody can contend that the son of an eldest son dying under twenty-one would take in this case.

There is another class of cases, *Bromfield v. Crowder*;\* the doctrine of shifting estates was there very much discussed. *Doe v. Moore*, and many other cases. In all those cases there was a devise over. It is there held that it is a condition subsequent. They all depend upon the devise over. There is neither decision nor declaration that a devise to A. at twenty-one is not contingent. He does not answer the description before that age. Then it is impossible to say which child will be entitled till one has attained twenty-one. It is impossible to produce a case, in which the estates have been permitted to shift, in the way in which they have been made to shift here. In order to make estates shift, very nice provisions are necessary, *Driver v. Frank*.†

Upon this point I have the opinion of the King's Bench with me. The Vice Chancellor has declared an opinion decidedly the contrary. *Stevens v. Stevens*,‡ shews that where there is an executory devise, the intermediate rents go to the heir at law. In *Bullock v. Stones*,§ it was held that a devise to A. when he should attain twenty-one was contingent; but that as A. was to be maintained out of the rents, the estate was to be held vested in the heir.

In the argument below, the two classes of cases depending upon adverbs of time and devise

\* 1 N. R. 313.

† 3 Maule and Sel. 25.

‡ Forr. Rep. 228.

§ 2 Ves. Senr. 521.

over were cited. *Spring v. Caesar* was relied on below, to shew that it would make no difference upon the circumstance of contingency, whether it was the party attaining twenty-one, or any other event.

*Lord Eldon*.—In that case it seems to have been held it was a present estate in fee, to be melted down to an estate for life, if A. did not pay 10s. on a given day.

*For the Appellants*.—The clause providing for maintenance is a strong corroboration of our argument, speaking of the shares as presumptive shares.\*

*Mr. Longley*.—The surplus rents of the Southwood Park estate result to the heir at law. They do not go to the presumptive devisee, because the devise is executory; and such devisee's interest in the intermediate rents is limited to maintenance merely.

Maintenance given out of interest does not vest a personal legacy. *Pulsford v. Hunter*,† a *fortiori* maintenance out of rents shall not vest a real estate devised before the time appointed, or deprive the heir of his rights.

The surplus rents do not go to the eldest son under the devise in the codicil. The claim has never been made by the eldest son; and the answers of the judges to the first and fifth questions, decide it against him.

They do not pass under the residuary clause in the will. General words are not always of universal operation. *Strong v. Teate*;‡ *Roe d. Helling v. Yeud*;§ *Roe d. James v. Avis*;|| *Goodtitle v. Miles*:¶

\* Fearn's Exec. Dev. 547.

‡ 2 Burr. 912.

|| 4 T. R. 605.

† 3 Bro. C. C. 417.

§ 2 New Rep. 214.

¶ 6 East, 494.

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this is confirmed by the answer of the King's Bench to the first question. Now all that is given by the will to the trustees under the residuary clause, is given in trust to sell. The testator has directed the application of part of the rents in question, in maintenance of the presumptive devisee. The surplus rents are of uncertain duration, and of variable amount, according to events which might happen; therefore no purchaser could be found for the surplus rents, and the testator could never intend they should be sold: consequently these surplus rents do not pass by the residuary clause in the will; and being undisposed of by the will or codicil, these surplus rents fall by way of resulting trust, to the testator's heir at law. This conclusion is consistent with the answer of the judges to the fifth question; who only find that the surplus rents belong to A. H. Chambers, the surviving trustee under the will; but do not declare the trusts, which it would have exceeded their province to notice.

As to the intermediate rents of the Marcham freeholds, of which the testator was seized at the date of his will, the effect of the clause of revocation in the codicil, taken singly, is expressly to revoke the direction to trustees to sell, contained in the will; and impliedly to revoke the devise itself to the trustees. This follows from the principle that trustees under a will, shall take no larger estate than is necessary, for the purposes of their trust.\* That this is also the opinion of the judges

\* *Doe d. White v. Simpson*, 5 East 162. *Glover v. Monckton*, 3 Bing. 13. See also *Morant v. Gough*, 7 Bar. and Cress. 206.

appears from the comparison of their answers to the second and sixth questions. This being so under this clause alone, no estate whatever in the Marcham freeholds remains in the trustees; and the clause of disposition contained in the codicil, gives only a future and executory interest to an uncertain devisee. This is executory, both as to the devise in the codicil, and the devise of the Southwood Park estate, contained in the will, according to all the authorities. Fearn's definition of an executory devise;\* Ch. J. Bridgman's definition;† Grant's case cited in *Hunt v. King*;‡ *Stevens v. Stevens*;§ a case where the devise closely resembled the devise in Mr. Elwes's codicil; Fearn's opinion in his Posthumous Works.¶ These authorities shew that both the devise of the Southwood Park estate in the will, and the general devise in the codicil, are executory.

The cases cited against us, do not disprove this position. *Spring v. Caesar* ¶ was much relied on by the Vice Chancellor in his judgment. That case is thus reported:—" *Si A. Tenant pour vie et R. en reversion en fee covenant a levier un fine, et que ceo serra al use A. et son heirs, si R. ne paie 10s. al A. 10 Septembris apres, et sil ceo pay, donque al use A. par vie, et apres al use R. en fee, en cest case cest paroll, (si, &c.) est un condition subsequent et nemy precedent, issint que A. ad un estate en fee tanque R. paie 10s.; et les subsequents parolls explane l'intent d'être subsequnt condition, scilicet, et sil ceo pay donque serra al A. pur vie et*

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\* Exec. Dev. 400.

‡ Cro. Eliz. 610.

¶ p. 191.

† Sir T. Raymond's Reports 83.

§ Ca. T. Talb. (Forr. Rep.) 228,

¶ 1 Roll's Abr. 415.

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*“ puis al use R. en fee, que montre l'intent detre que  
 “ A. aura un estate en fee tanque les 10s. pay.”*  
 Here the words “ *si, ne,*” if not, are equivalent to  
 “ *nisi,*” or unless. So the limitation will stand—  
 To the use of A. and his heirs, unless R. shall on  
 the 10th September next pay 10s; but if R.  
 shall then pay 10s. then “ *donque,*” i. e. from  
 that time, the fine is to enure to the use of A.  
 for life, with remainder to R. in fee. So the con-  
 dition was plainly subsequent, and the estate  
 first limited intended to vest immediately. It is  
 to be observed, that as far as regards the fee first  
 limited to A. the condition was subsequent; but  
 with respect to the estate for life of A. and the  
 remainder to R. in fee, the condition was pre-  
 cedent: and in order to make this case an autho-  
 rity to justify the decision in *Duffield v. Elwes*, it  
 should have been shewn, that the estate for life  
 to A. and the remainder to R. vested immediately,  
 before the 10th of September, and before any  
 payment of the money. In effect, the words  
 “ *si R. ne paia 10s. al A. 10 Septembris. apres,*”  
 which come between the limitation to A. and his  
 heirs, and the operative words of condition, viz.  
 “ *et sil ceo pay donque, &c.*” merely have a pros-  
 pect towards the condition subsequent which  
 follows; as if the limitation had been to the use  
 of A. and his heirs, *subject to the condition of*  
*defeasance hereinafter mentioned*, that is to say,  
 provided that if R. shall pay to A. 10s. on 10th  
 September next, then the estate shall be to A. for  
 life; remainder to R. in fee.

The case of *Edwards v. Hammond*,\* admits of a  
 similar explanation; there is a clear present limi-

\* 2 Show. 398, and 1 New Rep. 324, in Note.

tation, with a notice of a clause of defeasance to follow.

The class of cases in which there was either a devise over in case of the death of the first taker under twenty-one, or a present disposition of the rents and profits until he attained twenty-one, are distinguishable from the present. Thus in *Boraston's case*,\* there was a devise of a chattel interest in the rents and profits, until Hugh Boraston should attain twenty-one; and Hugh Boraston was mentioned by name, and described as the heir in remainder. In *Doe v. Moore*,† the devise was to John Moore when he attains twenty-one; but in case he should die before twenty-one, then over to James Moore his brother. So there the devisee was named, and there was a gift over, in case of his death under twenty-one. In *Bromfield v. Crowder*,‡ the estate given to John D. Bromfield on attaining twenty-one, was, in case of his death under twenty-one, given over to C. Bromfield; and Ch. J. Mansfield thought the *intention* was to give a vested estate to the first taker immediately. *Doe v. Nowell*,§ was a devise *in remainder* to all the children of J. Roake equally at twenty-one; but if only one child attains twenty-one, then to such child at twenty-one: and in case J. Roake shall die without issue, or such issue shall die before twenty-one, then over. So there was a gift over upon death under twenty-one. The same rule of construction applies to the cases of *Goodtitle v. Whitby*;|| *Mansfield v. Dugard*;¶ *Doe v. Lea*;\*\* and *Warter v. Hutchinson*.††

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\* 3 Co. 19.

† 14 East 601.

‡ 1 N. R. 313.

§ 1 Maule and Sel. 327. || 1 Burr. 228. ¶ 1 Eq. Abr. 195.

\*\* 3 T. R. 41.

†† 1 Barn. and Cr. 721.

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It has been much insisted on by the counsel for the eldest son of Mrs. Duffield, that "an event may be more or less probable, but cannot be more or less contingent;" this we admit: but the law itself in determining what shall constitute a legal contingency, does estimate the different degrees of moral probability. There are known and distinguished in law, a *potentia propinqua*, a near or common possibility; a *potentia remota*, a remote possibility; and a *potentia remotissima*, a very remote or most improbable possibility. The first of these degrees may make a legal contingency; the two latter cannot. All that we contend in the present case is, that the uncertainty of the person to take under the description assigned, is fully sufficient to create a legal contingency; and yet the events are not too remote in time or possibility, to form the basis of an executory devise.

The authorities clearly shew that the devise of the Southwood Park and Haverhill estates in the will, and the devise of the testator's general freeholds in the codicil, are both of them contingent and executory.

Supposing that the clause which revokes the direction to sell, leaves the estate in the trustees, yet revoking the trust for sale, it revokes all the trusts declared upon the sale and sale monies; for it is only through the medium of a sale, that the freehold property is by the will, made applicable to the purposes of the residuary fund; and the maxim that "*qui destruit medium destruit finem*,"\* must prevail; consequently the bare

\* Lampet's case, 10 Rep. 51.

legal estate remains in the trustees, without any trust declared ; and the trust results to the heir at law, until the vesting of the executory devise shall divest both trustees and heir of any interest in the property.

The younger children of the Plaintiffs who are Appellants in the second appeal, concur with us in contending that these devises are executory ; but they argue further, and the judges of the King's Bench, as far as we can conjecture from their answers, seem also to hold the opinion, that the codicil in some way or other, effected such a republication of the will, as to give the intermediate interest in the freeholds undisposed of by the codicil, to the trustees named in the will ; we insist that this notion is erroneous, and that there is not in the present case any such republication as can by law have the effect ascribed to it.

Republications are of two kinds, expressed and implied. We admit the doctrine to be settled by a series of authorities, that the mere execution of a codicil in the requisite form for a devise of freehold estate, will, *without more*, effect an implied republication of a will. But we insist that such implied republication can never be set up against the words of a codicil expressly preventing or limiting that effect, upon the maxim that "*Quere expressum facit cessare tacitum.*" A testator may limit the republication effected by his codicil to the estates already devised by his will, *Bones v. Strathmore*.\* a codicil expressly confirming a will by date, will not set up the whole will against an intermediate codicil re-

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\* 7 T. R. 482. 2 Bos. and Pull. 500.

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voking a part of that will, *Crosbie v. Macdouall*.<sup>\*</sup> And a confirming clause in the conclusion of a codicil, cannot set up a trust in a will, revoked by the earlier part of the codicil, *Holder v. Howell*.†

To apply these principles to the present case—The testator George Elwes in the outset of his codicil, refers to his will by date, and revokes the direction therein contained to sell his freehold property: he then disposes of all his freehold property, lands, tenements, and hereditaments, by way of executory devise, bequeaths a leasehold house to his widow, adds a new executor, and concludes his codicil by saying, that he does thereby “ratify and confirm the aforementioned will and testament dated as aforesaid, except as “is before excepted.” Therefore we have here an express clause of confirmation, or republication of the will, limited by an express exception. Every thing which by the earlier part of the codicil is excepted or taken out of the operation of the will, remains excepted at the conclusion and consummation of the codicil. No implication can be admitted to contradict this plain expression. Now by the operation of the clause of revocation contained in the earlier part of the codicil, there was excepted out of the will, the devise of the Marcham freeholds, or at any rate the direction to sell, and its dependent trusts; therefore by the just legal construction and effect of the codicil, the same exception continues in force: hence it follows, that the heir takes the intermediate estate, or a resulting trust of the

<sup>\*</sup> 4 Ves. 610.

† 8 Ves. 97.

intermediate rents and profits of the Marcham freeholds.

As to Withersfield, being an after purchased estate, the will alone could have no operation on it; therefore the clause of revocation in the codicil could not affect it. The only clause affecting it, is the disposition in the codicil. This, however, is an executory devise, and partial disposition; therefore the part of the fee undisposed of descends to the heir, until the period when the executory devise shall become vested.

If it be said, that the confirming clause in the codicil republishes the will, and so makes the will affect the Withersfield estate, still the confirming clause confirms with the exception, and not only republishes the devise to trustees, but confirms the clause of revocation also; in which case the intermediate rents of the Withersfield estate, would fall precisely under the same line of argument as those of the Marcham freeholds, and belong like them to the heir at law.\*

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For the Respondent, the eldest son.—*Mr. Horne* and *Mr. Pemberton*.

The argument on the other side is, that a party cannot take any interest, till he fully answers the description: our proposition is, that he can when the devise is to an individual when he attains twenty-one, or to a class who shall attain that age, whether the devise is immediate or in remainder; the parties *in esse* for the time being, who, if they attain twenty-one, would answer the description to take a present vested interest.

\* Mr. Rose and Mr. West appeared for the younger children, on whose behalf a distinct appeal was presented.



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As to the Southwood and Haverhill estates, there is by the will, a devise to trustees of the whole legal fee; then a devise to the eldest son, if only one, on attaining twenty-one; if two sons to the second; then there is a provision for maintenance out of the rents: it is said, indeed, that this is out of the property to which the devisee is presumptively entitled, but that is not so; presumptively applies only to the shares of personalty. The effect then of this devise is to trustees, till a son shall attain twenty-one; then to the son, with a provision for maintenance in the mean time. Now this is the identical case of *Bullock v. Stones*,\* which is supposed to be against us. There the rents were held to be given to the devisee, as soon as he came into *esse*; here the devisee was actually in *esse*.

But then it is said the estate cannot shift in the manner stated in the decree, and that it would require intricate limitations to effect this purpose, and *Driver v. Frank* is cited; but the only question is, whether the intention is apparent? if apparent, in the case of a will, it must take effect whether expressed in six lines, or six sheets of parchment: that was not disputed in *Driver v. Frank*. But the majority of the judges thought the intention not apparent; and the case was decided against the opinion of great judges.

It is then said, what would be the case if there were no sons, and the estate were to go to daughters, would they take vested interests? The answer is, that question does not occur. The conditions are perfectly different. In this latter case, there is no time fixed, which makes the distinction.

\* 2 Ves. 521.

Then as to the codicil. The devise is to the first son, on his attaining twenty-one and changing his name to Elwes. How would it be if the condition as to changing the name were omitted, would that circumstance make any difference? A devise to A. on attaining twenty-one, cannot be more contingent than a devise to him if he attains twenty-one, or when he attains twenty-one: but it is said according to the authorities this is executory. Now for this proposition not one decision is cited. Grant's\* case is the only one referred to. But that, though not an authority for the Respondent, is no authority against him. There the conveyance was to the use of A. when he attained twenty-five: before he attained twenty-five, he levied a fine to B. then he attained twenty-five and claimed the estate, and he was held to be barred. It is clear the decision must have been the same, whether he had an interest, or no interest. It seems from the citation in Coke, to have been assumed, that he had not an estate, but only a possibility, which was barred by the fine: it is stated, however, that no judgment was entered. But all that could be decided was, that he was barred, even if at the time of the fine levied he had no estate.

At the date of that case, the rule of construction now firmly established, had not been introduced. *Snow v. Tucker*, does not come within the principle for which we contend; but that was no decision upon the point: it was merely a decision, that a devise to a woman when she shall marry, is a good contingent devise, with a

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\* Cited in *Lampet's Case*, 10 Rep. 50.

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declaration that the estate shall go to the heir in the mean time, which nobody disputes. There is no time limited, which makes all the difference.

These are all the authorities which have been cited against the Respondents. The others are cases in his favor, which the Appellants' counsel have attempted to distinguish; but unsuccessfully. If the rule be, as they lay it down, is it possible that it can be so destitute of authority?

On the other side.—From Boraston's case downwards, there is one uniform current of decisions. It is said, indeed, that Boraston's case and the others of that class, depend upon the adverbs of time, and an intermediate estate: if that were so, it would apply to this case; there being a devise to the trustees till the devisee attains twenty-one. But this distinction has been exploded, as will appear by subsequent authorities. There are others which are not open to this supposed objection, as *Edwards v. Hammond*;<sup>\*</sup> where a surrender was made to the use of the surrenderee for life, then to A. at the age of eighteen; if he die under eighteen, then to remain to the use of the surrenderor. It was held that A. at fifteen had a vested interest. Was it not as impossible then to say, that A. under eighteen answered the description of the devisee, as to say, that here the Respondent under twenty-one answers the description? There was no intermediate estate; no devise over. The estate was to remain to the surrenderor and his heirs; which is just the same, as if there had been no limitation to him. This was a case of a specific

<sup>\*</sup> 1 N. R. 324. in not. 3 Lev. 132.

devisee named; but all the cases hold, that where there is a child born who answers the description, such a devise applies to him, as if he were specifically named.

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In *Bromfield v. Crowder*,\* the devise was to two for life, at the death of the survivor to A. if he should live to attain twenty-one, but in case he should die under twenty-one, to B. at twenty-one, if B. should die under twenty-one, to C. This is in truth the same case with the last; except that there is a devise over, which is said to make so much difference; yet that circumstance is not relied on: in fact, what difference can it make, unless the devise is to the heir, how can it afford any inference of intention? This again is a case of specific devisees.

*Doe v. Moore*,† is the same in substance, but Lord Ellenborough's judgment is very important. The pressure of this case has been so strongly felt, that one of the Appellant's counsel has denied it to be law. But it has never been overruled nor questioned. It is said not to be supported by the authorities on which it rests; but that is a mistake. It is followed by the important case of *Doe v. Nowell*.‡ That is the case of a devise to a class, and furnishes an answer to all the arguments on the other side. It was a devise to the children of A. when and as they attain twenty-one. There is not an argument against this decision, which would not apply to that. It was a devise to persons who should answer a particular description. How could any take who did not answer it? Was the estate to open and

\* 1 N. R. 313.    † 14 East 601.    ‡ 1 M. and S. 327.

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shift from time to time, to vest and divest as children were born and died? These are the objections to this decision. They all applied to that case, yet the judgment was against them; and that case was confirmed in the House of Lords.\*

It is true in that case there was a devise over; but that circumstance is no where the foundation of any decision. Fearne's opinion has been cited against us; but it is manifest that Fearne would have been of opinion against the decision in *Bromfield v. Crowder*. But it is remarkable that this distinction of a devise over, never occurred to him as of any weight, though he adverts to the distinction of an intermediate estate, which is now exploded.

Thus then stands the case as to the will, and as to the codicil also, unless it can be distinguished on the ground of taking the name.

With respect to the codicil, it is said, there is another and distinct condition, that the devisee is to take the name: they say that it is an uncertain act in itself, and that the thing being uncertain, the estate is contingent. For this they cite two cases; *Snow v. Tucker*,† that a devise to a woman when she shall marry, is good as an executory devise. *Atkins v. Hiccocks*,‡ was the case of a bequest to a daughter when she shall marry with consent: the last case is one of personalty, as to which the question is different from realty. Both these cases turn upon the circumstance that there is no time fixed. *Dies incertus conditionem facit*. When a time is limited at which the act is to be

\**Randall v. Dow*, 5 Dow. † 1 Sid. 153. ‡ 1 Atk. 500.

done, it is the same thing as if the event must happen, as the legatee attaining twenty-one. This distinction runs through all the cases. In *Spring v. Caesar*,\* the reason given is, that a day is fixed for the payment; a condition that A. shall do, and for the doing B. shall pay, is a condition precedent; but a time fixed for payment will vary the construction.† Though in grants estates shall not be till the condition precedent is performed, yet it is otherwise in a will; for the will shall be expounded by the intent of the party, *Jennings v. Gower*.‡ A condition to take a name, is clearly a condition subsequent; upon a devise to the second son of A. taking my name, and in default of such issue, to the daughter, it was held that a son who died at eighteen without taking the name, was entitled to the rents which accrued during his minority, *Traf-ford v. Ashton*.§ Suppose the son had attained twenty-one, but died before he had assumed the name, leaving children? Suppose there had been no son born at the death of the testator, would the devise have been void as too remote, inasmuch as the attaining twenty-one must precede the taking the name? After all it is a mere question of intention; if the rule compels us to say he meant the sons to take before twenty-one, can it be said still he meant him first to change his name?

If the intermediate rents are not given to the devisee, they are given to the trustees upon the trusts declared. As to the Southwood and Ha-

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\* 1 Roll. Ab.

† 1 Salk. 171.

‡ Cro. Eliz. 219.

§ 2 Vern. 661.

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verhill estates, the devise is to the trustees, of all the property, and the trusts are declared of all : As to the bulk of the estate for the son at twenty-one, as to the rest subject to maintenance upon the trusts of the residue, there is nothing afterwards to affect this disposition. As to the estates purchased before the date of the will, every thing is given to the trustees ; the devise is revoked only as far as the codicil revokes it. There is no revocation of the devise by the erasure, but only of the trust to sell. The codicil explains how far that devise is revoked, only to the extent in which an interest is taken out of that devise for an eldest son. What is not taken from the trustees remains in them, except as far as this alteration extends, the codicil confirms the will. The residuary clause will pass any interest which the testator had at the time, whether he contemplated it or not. It is for those who would restrict the words, to shew a manifest intention to the contrary. The codicil makes the will speak from the date. Then how does the residuary clause stand ? It is a general devise of all his property, not specifically disposed of by the will and codicil. *Goodtitle v. Meredith* ;\* *Hulm v. Heygate*.† The trust to sell forms no part of the residuary clause so altered ; if so, what becomes of the argument of intention arising from that circumstance ? The same principle necessarily carries the after purchased estates. It is for those who would restrict the generality of the expression, to shew a clear intention to contradict it. That the testator expresses certain specific purposes for

\* 2 M. and S. 5.

† 1 Mer. 285.

which he makes his codicil, is not sufficient to prove that he has not intentions more extensive.

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*Lord Eldon.*—The judges of the King's Bench appear in this case to have been of opinion, that no son of the testator's daughter was entitled to the estate devised, until he should attain the age of twenty-one, and that in the mean time, the rents and profits belonged to the person having the legal estate, giving no opinion as to the question of trust, which was not within their jurisdiction. The Vice Chancellor differed in opinion from the judges of the King's Bench; and it is certain that the judge in equity may decide against the opinion of the Court to which he sends for information. Lord Thurlow on one occasion, not being satisfied, sent back a case to the King's Bench for a better opinion: the proceeding was unusual, and Lord Kenyon was angry: but the judges of the King's Bench unanimously gave a different opinion. I followed this precedent myself, in a case\* relating to the estates of Miss Wykham in Oxfordshire. Having sent to the Court of King's Bench to ask what estate was created by the words of an instrument, the judges certified that it was an estate tail. I then sent the case to the Court of Common Pleas; they certified that there was no estate at all. I was not satisfied with these opinions, and decided differently from both. In *Boraston's case*, it appears from the margin of the report, that there were then one hundred and seventy authorities upon the same subject: yet the circumstances of this case are not precisely similar to those of any preceding case. Here

\* *Wykham v. Wykham*, 18 Ves. 395.



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the lands are given when the devisee attains the age of twenty-one, and not with a gift over, if he dies under that age ; which latter form of limitation does not prevent the vesting of the subject devised. As the judgment stands, the eldest, though he should not attain the age of twenty-one, is held entitled to the rents and profits. Upon the birth of a second son, he, according to the judgment, becomes entitled, divesting the right of the first son. If the second son should die under the age of twenty-one, the right to the rents and profits shifts back again to the first son ; and there may be ten sons in existence in the twenty-one years, who may each have some enjoyment ; so under this process of shifting the right, daughters might take before the events prescribed by the will ; the age of twenty-one, or marriage with consent ; and according to the same doctrine, the remainder man might take the estate every other year.

Such being the case, I have conversed with other noble Lords on the subject ; and this appears to me to be a question, which the House would not be justified in deciding, without calling on the judges for their opinions. It would have been a great satisfaction if I could have looked in this case only to the interest of the parties, but considering how few of these cases upon questions of vested or contingent interests have come before this House, and that it is the duty of judges to decide questions with a view to all other persons having similar interests, and affected by the same circumstances, and saying no more, than that I have great difficulty in acceding to the doctrines of the judgment in the

Court below, I cannot advise the House to proceed to judgment in this case, without having the opinion of the twelve judges, on the matters of law comprised in it. I therefore move, that the judges be summoned to attend, and that the case should be argued before them in the next Session of Parliament.

*The Lord Chancellor* agreeing in this opinion, an order was made accordingly; and the case was afterwards, in April 1828, argued before the judges; at the conclusion of which argument, Lord Eldon delivered the following opinion:—

*Lord Eldon.*—(After stating the case sent by the Vice Chancellor to the Court of King's Bench.) When this case was made for the opinion of the Court of King's Bench, it seems to have been assumed for the occasion, that the devise in the will, which I shall have occasion to point out, were devise of the legal estate. I take it to be perfectly certain, that the Court of Equity must itself decide upon the effect of trust devises, and cannot call in the assistance of the learned judges of any of the Courts of Westminster Hall, by so stating the expressions of the will, as to propose to them the consideration of a testamentary instrument which shall amount to a devise of equitable estates. I take it to be extremely clear according to all the rules of practice, that the Courts of Common Law cannot decide questions as to estates upon trust; and when we look to the nature of those questions, perhaps it may be in some degree as well, that they do not. It is quite clear that a Court of Equity can decide a legal question, because the authority of a Court of Equity, its judicial authority, enables it not

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only to decide questions of fact, not only to decide matters of evidence, but it has a right of itself, also to decide matters of law: there are many cases, in which, having by the interposition of a jury ascertained the fact, it has proceeded to decide upon it. That a Court of Equity frequently calls for the assistance of the judges of the Common Law Courts, with respect to matters of law, is undoubtedly true; but it may, if it thinks proper, assume the jurisdiction of deciding on matters of law, as well as matters of equity; and of course the judges of a Court of Equity, ought to know what is law, in order to make the application. I mention this circumstance, because we have heard of its being said, that such men as Lord Hardwicke and Lord Thurlow knew nothing about law; and some of the judges of later time, have thought they did sufficient to get rid of a decision in the Court of Chancery, by saying, that is nothing but Chancery practice.

These questions having been by the Vice Chancellor, referred to the Court of King's Bench, it is to be lamented, that the course of proceeding is such, when a case is sent from the Chancery Court to a Court of Common Law, that having to return again to the Court of Chancery, the Lord Chancellor, or the other judge sitting in that Court, has not the benefit of knowing on what grounds it is, that the judges have decided the question. Whether that can be altered or not I do not know: I think it is extremely desirable it should be. But we cannot expect the Common Law judges will be very hasty in consenting to alter the practice, unless we, sitting in Courts of Equity, will alter our practice, when they are

called upon to alter theirs. There is nothing so mischievous as sitting in an Equity Court, to find out that you have asked the Common Law Court a question, or have sent an issue to a jury, without first of all seeing that you have so far explained the object of the question, that the answer to it will enable you to decide the law and the fact. It does not appear to me, that a Common Law Court should be burthened with our equity cases, unless in questions where it is expedient and necessary that their assistance should be called for. It is the more important for other reasons that the judge in equity should look at the sort of cases which he sends to a Common Law Court, in order to assist his judgment, as to what is law in a certain case; because if he does not do so, or if he does not, when it becomes a case for a jury, express the grounds of his own difficulties, and state with what view the case is sent to the Common Law Courts, it is impossible that the Common Law judges should afford him effectual assistance; and if they do not, permit me to say that is his own fault in many cases.

Having had the misfortune of being in the Court of Chancery about four and forty years, I can speak from my own experience, from the time of Lord Bathurst, that we have had cases brought back from the Common Law Courts, where it was no fault of the Common Law Courts; but where they certified their opinion on the precise question referred to them, without its being mentioned to those Courts, or their being able from the case sent to them, to discover what were the difficulties that the judge in the Court of Equity had, at the time when he sent the case for their opinion. I

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could refer to several cases, in which the Courts of Common Law have determined, and rightly determined on that which was stated to them, but where they have determined the points submitted to their judgment, without the counsel who argued the case, ever themselves knowing what were the points on which the Lord Chancellor, or the Master of the Rolls, or the Vice Chancellor desired assistance; without their knowing what was the difficulty of the learned judge in Equity. I say, therefore, that where a Court of Equity in special cases, calls for the benefit of a trial by jury, with respect to a fact, or for the benefit of the opinion of the Common Law judges in matters of law, it is time and expence thrown away, unless the matter is put into such a shape, that it may be perfectly understood, what it is that the Court of Equity wishes to have decided. I cannot find from any report of this case, what led to the statement of those questions for a Court of Common Law. The case was heard in the Vice Chancellor's Court, and these questions were framed for the opinion of the Court of King's Bench, but before this House we have none of the detail.\*

The answer to the question, (relating to the devise to the trustees) is the only answer which it was competent for a Court of Common Law to give; namely, that the devise of the legal estate being in trustees, the trustees were to have the rents and profits. What equitable dispositions were made of those rents and profits, it was not for a Court of Common Law to consider or to de-

\* Here the answers of the judges were stated.

termine. They state that the rents and profits belonged to the trustees, until the first son of the Plaintiff Emily Frances Duffield should attain twenty-one years, or in failure of such son, or his attaining that age, till a daughter should attain that age, or be married with consent, according to the will; that is, they being the legal holders, would according to the effect of this as being a legal devise, take the rents and profits; and that is the only answer which they could give to a question so framed.

With respect then to the intermediate legal rents and profits, it only states, they are effectually devised by his codicil, until the son of the Plaintiff Emily Frances Duffield shall attain twenty-one years and change his name to Elwes. or until the events which are referred to take place; and that they belong to Abraham Henry Chambers the surviving trustee, under the will of the testator.

This information having been conveyed from the Court of King's Bench to the Court of Chancery, that Court\* made a declaration, the result of which is, that the eldest son took a vested estate, subject to be divested by his death under twenty-one, or by the birth of a second son; and that the second son took a vested equitable estate in fee on his birth, but that that estate was subject to be divested in case of the second son dying, or becoming neither the second or only son. The declaration does not go on to state, that if it should come to pass that the second son died, leaving an eldest son the only

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\* Here the declarations of the decrees were stated;

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son, the estate must go back again : and if a third son was afterwards born, the estate would be again divested, and go to the third son ; and so the estate would be changed for twenty-one years as often as events of such a nature could happen.

Taking it to be real property and legal estate, if on the opinion of the Court of Common Law being expressed, the conscience of the judge in the Court of Equity is not satisfied, it is his duty judicially to differ from them, and to declare that difference. My memory calls back instances, in which the case has been sent a second time for the opinion of a Court of Common Law. According to the practice of this House, you cannot put to the judges any question directly upon the point before the House ; that is, you cannot ask them such a question, as whether the opinion of the judge in the Court below, is right or wrong ; nor can you point to them the question which the learned judge put to himself, when he decided the cause. Whether this is a wise mode or not, the practice of this House is, so to frame the state of facts, and so to raise the question upon that state of facts, as to enable you to find doctrine out of the answer applicable to the case before you. It is established also, as the practice of this House, that you cannot ask the judges any question, with respect to equitable estates. It becomes therefore necessary, in order to bring us to the point, that a statement should be made and delivered to the judges, before you can reasonably ask their opinion upon the effect of this will ; that statement I will cause to be drawn out, with a review of the case, which questions may be delivered to the judges, in order that

they may have, upon the case so stated, an opportunity of considering the questions which it presents for the decision of this House.

With respect to the devise of the Southwood Park estate, it will be in substance, leaving out the names of the trustees, "I give and bequeath "all that my freehold and copyhold farm," &c.\* He says nothing about third sons, except by implication, providing for the third, fourth and fifth sons. So likewise with respect to daughters, all he says is, "in case there shall be no son," &c. "then to such of the daughters," &c. By altering the frame of the devise, with respect to the Southwood Park farm and estate, so as to make it a devise without the intervention of trustees, the case for the opinion of the judges, may present it as the devise of a legal estate throughout.

With respect to the part of the will, which adverts to the maintenance of the children, and the fund still existing under this will, except so far as the object of it may have been effected, the fund for children, and the maintenance of children, that clause applies to the rents and profits of Southwood and Haverhill, with reference to the maintenance of such child or children, as might be entitled to that property. It is necessary that, on this part of the case, it should be stated to be a power unconnected with a trust; a power given to A. and B. to apply the fund to be raised.† The observation that arises upon this provision, I shall state to you presently. The question being considered as arising on the legal estates, I

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\* Here the devise of the Southwood estate was stated.

† Here the power was stated.



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propose to address some question, if it becomes necessary, to the judges, with respect to the point what is to be considered either as to the substance of the devise, or as to the undisposed rents and profits, if there are undisposed rents and profits, under the residuary clause in this will.

I have before stated, that the effect of the declaration in the Court of Chancery is, that the first son of Mrs. Duffield is to take, as I understand it, a vested interest in the property, subject to be divested in case of the birth of a second son; that the effect of the destination in the will is, that if the second son dies, and a third son is born, the existence of the third son divests the property out of the first son again, unless you should be of opinion, that the third son is not at all provided for. It appears to me, I confess, that by implication the third son is provided for, but the effect will not be this, if the first son takes immediately upon the interest of the second being divested. If that second son should die before the third son is born, the estate must go back; and then if a third son comes into existence, the estate having so gone back to the first son, would be divested out of him again, and go to the third son; the change of interest taking place according to those events which may occur.

There is one leading question, therefore, to be put upon this part of the case; whether according to law, (for the equity must be left out,) it is the true construction of this will, that the first son took a vested interest in the estate before he attained twenty-one? If you are furnished with the opinions of the judges on that point, you will be able by your own reasoning, to apply the

principle of that decision, to all the subsequent parts of this clause—Whether a second son being born divested the estate, and a third son coming into being after the second son died, again divested it out of the first son? and so on, going backwards and forwards. If in the case of the first son that might take place; if it be true, that the first son takes the estate on his birth till it be divested on the birth of the second son, the consequence must be the same, as it appears to me, with respect to all of them.

On this part of the case, I will take the liberty of stating, and calling your Lordships' attention particularly to the clause in the will. It has been argued on a former occasion in this House, that the words imported that there was a vested interest on the birth of a son. I confess that after all I have learned in the course of a long professional life, I should have argued it just the other way: that the words presumptively do not mean now, but at a future time. At the same time, these words may be qualified by other words, that may be found in the will. There is one question which it may be desirable to ask the judges, with reference to this matter, because the maintenance of a third son being to be provided for out of the trust devise, that maintenance is devised out of the rents and profits of the estate, which is either vested or not vested, at the birth of that son. The maintenance undoubtedly, may very well come out of the rents and profits of an estate, when the estate itself is not vested in the son; but you will have to consider this—What says the will, with reference to the application of maintenance, in case a second son should be born? If that second son

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should be born, there would be a son entitled. Then how are you to find the maintenance of a son presumptively entitled? and how is a maintenance to be given to the eldest son, who is no longer entitled? Then again, supposing the second son to die, the eldest son will again be presumptively entitled; and then, though during the existence of a second son, you could not take a maintenance for the eldest son, the eldest son, who would be unprovided with a maintenance during the life of the second son, would become entitled to a maintenance out of the rents and profits of those estates, on the decease of the second son. Then you have a third son comes into existence, and that third son coming into existence, he is one of the objects of the devise, he would become the person presumptively entitled; the consequence of that would be, that there would be a provision for his maintenance; but if the eldest son was under the age of twenty-one, there would be no provision for his maintenance. It must be considered, and that may furnish an answer to some arguments which might be raised, that the fund is not constituted of the rents and profits only of this estate, but a fund constituted by the use of other property, which is comprised in the disposition, with reference to which, this provision for maintenance is made. If then, we look at this other property, perhaps we may be allowed to look at it in reference to the maintenance of the eldest son, if he should lose his maintenance by the birth of a second son. A question, therefore, should be put to the judges, with respect to that point also, in order that we may be furnished with their opinion, and one general question, taking

this as a devise of legal estates, as I should by the alteration of the will state it, in order that the judges may understand the statement and the questions together.

Another question will be, to whom do the rents and profits *ultra* the maintenance (to whatever son the maintenance is to be paid) belong, until the first son and second son, and so on, attain the age of twenty-one years? If you should be advised that the decree is wrong, in stating that the estate vested on the birth of a first son, the answers to two or three questions of that sort will assist you in respect to the Southwood estate. If the rents and profits do not go with the body of the estate, they must be regulated by some principle according to the will, or they must be embodied in the devise of the estate; some way or other they must be disposed of.

Then with respect to the other property as to the devise in the codicil, one question will be, what is the effect of the codicil on the dispositions in the will? Another question will be, as to its revoking or not revoking? Another question will be, stating this also as a matter of legal enquiry, whether the codicil destroys the effect of the will, with respect to the freehold property, taking it out of the trustees or not? If it leaves the land itself as belonging to the trustees, then under the codicil, it would be an equitable estate; if on the other hand, it destroys both the power of sale, and the estate which was given to the trustees, then it would be a legal estate under the effect of the codicil; and that question might arise, because although by the codicil he affects the property in the way supposed, yet he does not utter

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the words, I devise this property immediately, so and so, but he says, my meaning is only to revoke that part of the will, whereby I direct the sale of my freehold property, not in express terms revoking the devise to trustees. When he comes to make the devise, he does not devise the property immediately to them, but gives it to a son or daughter on their attaining the age of twenty-one years, and taking his name of Elwes. There will be questions, whether the estate is given to the trustees for twenty-one years, or whether the estate is given to the first son presently, as the decree understands it to be divested in case he does not attain the age of twenty-one, and does not change his name to Elwes; or whether until he has attained the age of twenty-one and changed his name to Elwes, he has an interest in the property connected with the beneficial interest in the property undisposed of during infancy? and there being property undisposed of, according to the will and codicil, to whom does the property in the mesne rents and profits, between his birth and his attaining twenty-one years, go? but before that question can be asked, it will be necessary to have the opinion of the judges, whether the declaration in this decree, that he takes an immediate interest on his birth, to be divested on his attaining twenty-one, can or cannot be supported, if this is to be taken as a legal devise?

Another question will be, putting it in another way indeed, whether he has any interest on attaining twenty-one, between the period of his attaining twenty-one, and taking the name of Elwes?

These are all the questions arising on this will, which I propose should be put to the judges, so corrected, as to point out the questions which may arise, as to the equitable interests.

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The questions for the opinions of the judges having been drawn up by *Lord Eldon*, and proposed by order of the House to the judges for their opinion, on the 2d of March, 1829, *Best, C. J.* delivered the unanimous opinion of the judges, stating the questions with their answers, as follows:—

First question.—

According to the true construction of the testator's will and codicil, as above stated, would any son of the testator's daughter by her said husband, during his infancy, be entitled to the rents and profits of the testator's estate called Southwood Park or the farm at Haverhill; or any daughter of his said daughter by her said husband, being unmarried, and under the age of twenty-one, be so entitled during her infancy or before she married?

We think that no son of the testator's daughter by her present husband, during the infancy of such son, nor any daughter of the testator's daughter by her said husband, being unmarried, and under the age of twenty-one, would be entitled to the rents and profits of the estate called Southwood Park, or of the farm at Haverhill.

Second question.—

If the younger of the said infant sons should die in infancy, would the elder of such two sons, during his infancy, be entitled to such rents and profits? if he would be so entitled, and a third

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son should be born of the testator's daughter by her said husband, would such elder son continue entitled during his infancy, or would such third son becoming a second son, be so entitled?

We think that if the younger of the two sons should die in infancy, the elder of such two sons would not be entitled to such rents and profits during his infancy; and that a third son becoming a second son, would not be entitled to such rents and profits during his infancy.

Third question.—

If no son of the testator's daughter by her said husband, would be entitled to such rents and profits during his infancy, and no daughter of the testator's daughter by her said husband, would, during her infancy, and before marriage, be so entitled, to whom would the rents and profits of the said premises belong, during the infancy of such sons and daughters of the testator's daughter?

We think that the rents and profits of the said premises, would belong, during the infancy of such sons, and during the infancy, and before the marriage of any daughter to the testator's heir at law.

Fourth question.—

The testator having given such power to Elwes and Chambers as aforesaid, and to the survivor of them, out of the rents and profits of the said premises, (by his will first devised) to which any child of his daughter should be presumptively entitled, to provide maintenance for such child; and there being two sons of his daughter, infants, at the time of his death, can Elwes and Chambers execute such power, by applying part of the

rents and profits of the said premises, for the maintenance of the second of such sons in his infancy ; and in case he (such second son) should die in his infancy, the elder of such sons being at the time of such death also an infant and an only son, can Elwes and Chambers in that case apply part of the said rents and profits for the maintenance of such only son during his infancy ? and in case after the death of such second son in his infancy, the testator's daughter should have a third son born during the infancy of the testator's daughter's first son, could the said Elwes and Chambers in execution of the said power, apply part of the rents and profits for the maintenance of such third son having become a second son, and would they cease to have a power of applying any part thereof to the maintenance of an only son ; or supposing there was an only son, and a daughter of the testator's daughter unmarried, and an infant, would Elwes and Chambers have the power of applying part of the rents and profits for the maintenance of such daughter during her minority ?

We think, that there being two sons of the testator's daughter, infants, at the time of his death, Elwes and Chambers should execute the power, by applying part of the rents and profits of the premises first demised for the maintenance of the second of such sons, during his infancy ; and in case such second son should die an infant, the elder son being an infant and only son, Elwes and Chambers might apply part of the said rents and profits for such only son's maintenance during his infancy, and whilst he continued an only son ; and that in case after the death of such second son in

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his infancy, the testator's daughter should have a third son born during the infancy of the first, the power of Elwes and Chambers to allow any part of the said rents and profits to the maintenance of the first son would cease, and they should apply part of the rents and profits for the maintenance of such third son: and that supposing there was an only son, and a daughter of the testator's daughter unmarried and an infant, Elwes and Chambers would not have the power of applying any part of the rents and profits for the maintenance of such daughter during her minority.

Fifth question.—

According to the true intent of the testator, is any son of the testator's daughter entitled to the rents and profits of the freehold estates mentioned in the testator's codicil, (assuming that the legal estate in such freehold estates is thereby devised) until and before he attains the age of twenty-one years, and also assumes the name of Elwes, and if not, to whom do the rents and profits of such freehold estates (assuming as aforesaid) belong, under the true effect of the *will and codicil*, until a son attains that age and assumes that name?

The judges are of opinion, that no son of the testator's daughter is entitled to the freehold estates mentioned in the testator's codicil, until he attains the age of twenty-one years and assumes the name of Elwes; and that until a son attains that age and assumes that name, the rents and profits of such estates belong to the testator's heir at law.

All the judges who were present at the argument of this case, concur in the answers which I have

given to the questions proposed to us by your Lordships; but for the reasons which I shall proceed to give, I only am responsible.

These questions refer to a codicil; your Lordships will observe that only the will of the testator has been sent to us: we have therefore considered, that the codicil referred to by your Lordships' question, is that which appears in the printed case.

As the case sent to us states a residuary clause, we have not felt ourselves at liberty to consider the effect of the residuary clause, which appears in the printed case, but have formed our opinions upon that which is stated to us by your Lordships; and it not appearing on that statement, that the residue of the testator's property is devised to *any particular person*, we have said that during the contingencies, the estates would descend to the heir at law; and do not, as in the case of *Stephens v. Stephens*, (Cases Temp. Talbot 228) where the residue was expressly devised to Sir Thomas Stevens, pass under the residuary devise in the will.

The estates in the Southwood park and Haverhill farm given to the second son, and if there be only one son, to the eldest, and if there be no son, to a daughter, do not vest until a second or only son attains twenty-one; or in case of the failure of male issue, until a daughter attains twenty-one, or marries with the consent of the trustees appointed by the will.

The testator's other freehold estates do not vest until some son of the testator's daughter shall attain the age of twenty-one years and take the name of Elwes.

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Until these estates become vested, the estates, and the rents and profits derived from them, pass to the heir at law of the testator, as estates not disposed of by the will.

Whilst estates remain contingent, those in whom they are at a future time to be vested, have no interest in the estates, or the rents and profits of such estates.

Such estates must descend to the heir, if they are not given to any person to hold until the events happen, on which they are to become vested. This point is too clear to require any observation; indeed, it was not disputed at the bar. Testators who create contingent estates, often forget to make any provision for the preservation of their estates, and for the disposition of the rents and profits in the intermediate period, between their deaths and the vesting of their estates. In such cases, the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period, and that they have obtained the possession of them from the inattention of, and not from the bounty of the testator, or from the mistake of the professional man who drew the will, will make the most that they can of them during the time that they remain theirs, regardless of any injury that the estates may suffer from their conduct. The rights of the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them. If the parents attaining a certain age, be a condition precedent to the vesting estates by the death of their parents, before they

are of that age, children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to.

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In consideration of these circumstances, the judges from the earliest times were always inclined to decide, that estates devised were vested; and it has long been an established rule for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession. To accomplish this purpose, a distinction has been made between the adverbs *if* and *when*, to which the learned in our language, not of the profession of the law, would perhaps not agree: upon this distinction, however, many equitable arrangements of property have been made; upon this distinction the titles of many estates depend, and it will therefore be the duty of the judges to observe it. The condition precedent to the vesting of these estates is so apparent—it is declared in such express terms by the will, that no ingenuity can explain it away; no refinement can get rid of it; and by holding that these estates are vested, we must overthrow the case of *Stephens v. Stephens*, which is directly in point to the questions submitted to us, and the authority

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of which was never questioned. The state of the affairs of this family will not be sooner settled by the artificial contrivance of vesting and divesting the estates, than by keeping them contingent, until a final vesting of them can take place, agreeable to the disposition made by the testator. How can it be said, that the affairs of a family are settled, by vesting an estate in an eldest son, and divesting when a second is born ; then vesting it in the second, and divesting on the birth of a third son, and death of the eldest ; and by again vesting it in a daughter when there are no sons, and divesting it again on the birth of a son. The only effect of vesting these estates would be, to preserve them for the children of sons that die before they attain the ages at which the estates would vest.

But is it wise to encourage the marriage of infants, by making a provision for the children, however imprudently, and however much in opposition to the wishes of their guardians, such marriages may be contracted. The uncertainty of a provision for a family may occasion a pause, before the most important step in life be taken, which cannot be attended with lasting inconvenience, and may prevent lasting misery. Children will seldom suffer from estates remaining contingent, until their parents attain the age of twenty-one ; as few, to whom such estates are given, will have legitimate children before they are of age. This objection, if of any weight, will only partially apply to this case, for provision is made for daughters, who may marry with the consent of their guardians, and die before they are of age leaving issue. As the testator has not made

the same provision in favour of the children of those sons, who are to succeed to his estates, as he has made for the children of his daughters, and the younger sons, who are to divide with his daughters the residue of his property, it is to be supposed, that he did not intend that the families of the first or second sons should inherit, if their parents did not live until their estates became vested. Knowing how difficult it is to get at the intent of parties, when all possible care is taken to express their intent with the greatest precision in the instruments made by them, and what different interpretations from the different constitutions of men's minds, and from their different habits and education, are put on the same words, I do not much rely on the intent of the testator. I take for my guide, what I think is a sounder principle of decision in a case, where a testator has expressly secured what he has given to some of his grandchildren, to their issue, and has not expressly secured the freehold estates to the families of those children, to whom he has devised them, namely, whatever his intention may be, that intention is not sufficiently expressed for any Court to act upon it, when by so doing, we must get rid of a condition clearly expressed in the other parts of the will.

It is impossible to say that the words of this will do not import conditions precedent to the vesting these estates.

The estates are not given to any *particular children* by name, but to *such children as shall attain the age of twenty-one years*. Until they have attained that age, no one completely answers the description which the testator has given of those

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who are to be devisees under his will, and therefore there is no person in whom the estates can vest. It is an established principle of law recognized by all the cases that are in the books, and founded on the nature of things, that estates must remain contingent until there be a person having all the qualifications that the testator requires, and completely answering the description given of the object of his bounty in his will.—In *Frank v. Frank*, 8 Taunton 145, it is said “to make an estate contingent we must have such words as these, I give the estate to *such persons* who shall at the death of B. F. be the second, third or fourth sons.” The present will has the substance of these words, for the devisees are to such only son as shall first attain the age of twenty-one; in case there shall be two or more sons who shall attain the age of twenty-one, then in trust for the second of such sons, (then in trust for such daughters as shall first attain the age of twenty-one years.) The codicil gives the estates to *that son* who shall first attain the age of twenty-one, and change his name to Elwes. In *Frank v. Frank*, (Gibbs, C. J.) says, “there was a son *in esse who answered the description* in the will.” “A contingent remainder devised to a first, second or other son would vest absolutely as soon as such son should come into being, unless there was a clear intent expressed or implied that it should remain contingent until some later specified time.” In the case submitted to us by your Lordships, there is a clear intent expressed that these estates shall remain contingent until it be seen whether one or more sons would attain the age of twenty-one years, and if there be no sons whether any

daughter would live to that age, or be married with the consent of the trustees.

The testator has given us an explanation of the terms of the devises of his real estates. In the clause of maintenance he directs his trustees to provide maintenance for the children of his daughter out of the estates or property to which any child shall be presumptively entitled.

A presumptive title is only a possibility, a presumptive heir is one who will be the heir if no one having a preferable claim be in existence at the time of the death of the person to whom the presumptive heir stands in that relation.

When the testator speaks of his grandchildren as presumptively entitled, he must be understood to say that they have no absolute or vested interest.

In the case of *Stephens v. Stephens*,\* the testator after giving estates to his grandson William and Thomas devised the same property "to such other son of the body of his daughter Mary Stephens as should happen to attain the age of twenty-one years." There is scarcely any difference in the terms of the devise in that case and in those in the devises under consideration. The meaning of each is precisely the same. In the case referred to, the judges of the King's Bench (Lord Hardwick being then at the head of that Court) certified that the vesting of the estate was suspended until a son unborn should attain the age of twenty-one years. Lord Chancellor Talbot made a decree according to this certificate and said that it agreed with his own sentiments and he hoped it would be for the

\* Ca. Temp. Talb. (Forr. Rep.) 228.

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future a leading case in the determination of questions of this kind—I believe that his Lordship's hopes were realized—it has been considered as a leading case—and the impugning its authority would shake a principle of law on which the titles of many estates depend.

It only remains for me take notice of that part of the will to which your Lordship's fourth question relates, that is the clause which gives to the trustees the power to provide a maintenance for the testator's grandchildren. The words of this clause are as follow.—

“ And my will further is and I do hereby declare and direct that the said John Elwes and Abraham Henry Chambers and the survivor of them, his executors, administrators and assigns, shall by and out of the rents, issues and profits of the said freehold and copyhold estates by this my will first devised, and by and out of the part or share of and in the said stocks, funds and securities, and the dividends, interest and annual proceeds thereof, to which any child or children of the said Amelia Maria Frances Duffield by the said Thomas Duffield or by any aftertaken husband shall be presumptively entitled, pay and apply for the maintenance of any such child or children in the mean time and until his, her or their share or portion, shares or portions, shall become payable, such yearly sum or sums of money as to them the said John Elwes and Abraham Henry Chambers, or the survivor of them, his executors, administrators or other the trustees or trustee for the time being of this my will shall seem meet.”

The trustees are directed to execute this power by providing a fund for the maintenance of each child out of the property to which such child is in the language of the will presumptively entitled; an only son would under the will be presumptively entitled to Southwood Park and Haverhill Estates. The testator says nothing about providing maintenance out of the estate left by the codicil to the eldest son—because these he then intended should be sold. As being presumptively entitled to these estates, the only son would be entitled to a maintenance out of the rents and profits of them; when his presumptive title ceased by the birth of a second son, the right to maintenance of the first would be determined. On the birth of a second son, that second son would become presumptively entitled to the Southwood Park and Haverhill Estates, and it would become the duty of the trustees to provide for his maintenance and education out of the rents of those estates. Upon the death of an elder son and the birth of a third, the second would become an elder son and he would cease to be presumptively entitled to the Southwood Park and Haverhill Estates. A presumptive title to which estates would commence in the third son. From this period the son which was born second must be maintained out of the estates destined for the first; and the son born third out of these given to the second: this change in the mode of executing the power must take place whenever a second son becomes an elder, and any son becomes a second. No daughter can ever be entitled to a maintenance out of the estates whilst there is a son in existence, for no daughter will be

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presumptively entitled until there is a failure of male issue. It may perhaps occur to your Lordships that these changes in the execution of the power of maintenance may render the accounts unnecessarily complicated. Courts of justice are not to consider the inconveniences that may follow from the execution of powers according to the terms by which they are created.

We can find nothing in the will that would authorize any Court to dispense with an exact compliance with the terms of this power, and we therefore think that it should be complied with to the letter.

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*Lord Eldon.*—This was an appeal from a decision made by the present Master of the Rolls, which came before this House in consequence of the Lord Chancellor of that day having signed an appeal, with a view to the case finding its way to this House, without its being immediately decided by the Lord Chancellor himself, and I confess it is matter of great satisfaction to me that the case has taken that course. From the first moment I read this will, I entertained considerable doubt whether, notwithstanding all the attention which had been paid to it in the Court below by a most able Judge, the decree which he had delivered was correct. When the matter was argued at the Bar of this House it occurred to me, notwithstanding what Lord Hardwick had said in the case of *Stephens v. Stephens*, and what Lord Talbot had said in consequence of that determination, that the decision which had been made, with the subsequent decisions formed upon it, left the matter in such a state that it was of great importance to


have the question settled in the most solemn manner; and looking to those decisions which had taken place between the decision in the case of *Stephens v. Stephens* and the present, I found it one of the most difficult tasks that I ever have had to execute, to draw out the proper questions for the opinions of the learned judges; I think they will do me the justice to say that I exhausted the merits of the case by the questions which I addressed to them, and I should not satisfy myself if I did not say that the learned judges have given a most attentive consideration to this case, and have most plainly stated by the Lord Chief Justice their reasons for the opinion they have given. That opinion must necessarily lead to the reversal of the decree pronounced by the Master of the Rolls, and I conclude the little with which I have to trouble your Lordships, by stating, that having in view all the doctrines which have been stated in the answers to the questions addressed to the learned judges, I do hope that this at least will be a leading case, not affecting so much the distinctions in the earlier case as those which appear to me to exist in the cases between the decision of *Stephens v. Stephens* and this case.

The answers of the learned judges will necessarily lead to a reversal of this decree. The reversal of the decree will create the necessity of great care in forming the decree now to be made arising out of a will and codicil so singularly expressed as this is. I feel it my duty to return my humble thanks to the learned judges for having pointed out so distinctly what belongs to the case. With respect to the maintenance, I am happy that I have succeeded in drawing the

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consideration of the learned judges to the point which was material; and I feel obliged to them for the rule which they have given in their answer in reference to that point, which will enable the House to do justice more fully than it could otherwise have done.

It is impossible, without taking these papers and going through them with great attention, to draw that which must be the judgment of the House. That may be done in one or other of two courses: the one is to state the law as it has been delivered by the judges, and to remit the case to the Court of Chancery to apply that law; the other is, instead of following that course ourselves, to pronounce a decree, and having had the assistance of the learned judges, I think it my duty to propose a decree in the very form in which it ought to be sent to the Court of Chancery by this House: thus, endeavouring to save that Court the trouble which must belong to the drawing out a decree in a case so difficult as this is. I think that is the more wholesome way of proceeding, and I conceive my time will be thought by your Lordships not ill bestowed, if I can accomplish the purpose of drawing out such a decree as I think ought to be made, and ought to regulate subsequent cases, carrying with it the authority which belongs to a decree pronounced in the terms in which this decree should be.

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In May 1829, further questions were put to the judges as follows:—

1. Upon its being assumed that the decree, or decretal order, ought to be reversed, so far as the same declares that any son of the daughter of the

testator would have a present vested interest in, or be entitled to the estates at Southwood and Haverhill, in the will mentioned, or the rents and profits thereof, before he attains the age of twenty-one years, or have a present vested interest in or be entitled to the freehold estates devised by the codicil, or the rents and profits thereof, until he attains the age of twenty-one years, and takes upon himself the name of Elwes according to the testator's direction, and assuming that some son of the testator's daughter will hereafter acquire a vested interest therein, to whom do the rents and profits of the freehold and copyhold estates of the testator at Southwood and Haverhill in the will mentioned, and the rents and profits of the freehold estate in the codicil mentioned, go and belong respectively, until some son of the testator's daughter shall acquire a vested interest therein respectively, having regard to the whole words, contents and effect of the testator's will and codicil?

2. And assuming that the testator purchased copyhold estates after the date of the will, are such copyhold estates having such regard as aforesaid, to be considered as devised by the testator?

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On the 23d of June, 1829, *Alexander, C. B.* after stating the provisions of the will and codicil on which the questions arose, delivered the unanimous opinion of the judges as follows:

The first question respects the rents and profits of the freehold and copyhold estates at Southwood and Haverhill. We are to assume that the specific devise of these estates is not immediate

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and vested, but future and contingent; that it does not draw along with it the rents and profits intermediate between the death of the testator and the happening of the contingency, and we are desired to testify our opinion to whom, upon the whole frame of these testamentary dispositions, these intermediate profits go and belong.

We are of opinion that they go and belong to the surviving trustee of the testator's will, by force of the residuary clause in the will. This clause is as comprehensive as can be imagined. It extends in express words to "the residue of all the property to which he should be entitled at his decease, or over which he had a disposing power, to the residue of his estate of freehold, copyhold, or for years;" and then after some further enumeration, and lest something should escape, he adds "of whatever other nature or kind the same or any part thereof may be."

There can be no doubt that these would pass the intermediate rents not specifically disposed of. It is not essential to the effect of a residuary clause, that the testator should have had in his immediate contemplation, the property to which his expression applies. Its very nature and object is to envelope every thing, whether present at the moment to the mind of the testator or not. In *Stephens v. Stephens*,\* a leading case on the subject of executory devises, of the same description with this, a residuary clause was held by the Court of King's Bench, with Lord Hardwicke at its head, to pass the intermediate rents and profits. Many other cases, if necessary, might be cited to

\* Cu. Temp. Talb. (Forr. Rep.) p. 228.

the same effect. It would not have been safe to have come to the conclusion I have intimated, without examining whether here is any other provision in the will, to narrow and limit the residuary clause, so as to exclude these intermediate rents. One only passage has been mentioned, the direction for sale. It is said, the testator could not mean an interest such as this to be sold : that it would be a strange direction to be applied to property of this description, and therefore that he could not intend to include it in his residuary bequest. Observations of this sort, oppose but a feeble obstacle to the necessary effect of clear words. They merit attention when the words are equivocal and ambiguous, and where, from the indistinctness of the language used, you must, to give it any meaning, from necessity, resort to probability and conjecture : but here the language is plain and explicit ; and if upon any such reasoning, this interest were withdrawn from the residuary clause, the testator's language would not be construed but contradicted.

I feel that these observations may be deemed unnecessary, because in truth, the fact in which this doubt originates, fails almost entirely. The will, though it did originally, does not now direct any part of the freehold to be sold. The codicil revokes the power of sale, as to the freehold, and confirms the will : the will, therefore, must be read, as if there was no such direction to sell ; and, therefore, that circumstance at this day, interposes no obstacle to the true construction of the words used in the residuary clause.

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We are of opinion, that by force of the residuary clause, the legal interest in the intermediate rents and profits of the Southwood and Haverhill estates, belongs to the surviving trustee of the testator's residuary estate.

The second question respects the intermediate rents of the freehold estates, devised by the codicil to the son of Mrs. Duffield, who shall first attain twenty-one, on his attaining that age.

The judges are also of opinion, that these rents and profits belong to the surviving trustee, by force of the same residuary clause, bound, as the former was, by the trusts declared in the will.

It is without question, that the legal fee simple of the estate, out of which these rents and profits are to arise, was devised, by the residuary clause in the will, to the trustees.

That devise must remain at this day in full force, except in so far as it is altered by the codicil. We must look, therefore, at the codicil, in order to ascertain how far it has altered the devise of these freehold estates, and to what extent it leaves them vested in the original devisees undisturbed. There are only two provisions in the codicil, which touch the freehold in question. The first is the revocation of the direction to sell this estate; the second is the contingent and executory devise to the first son of Mrs. Duffield attaining twenty-one, when that event shall happen.

How far do either of these curtail or limit the absolute gift in fee simple of the estate itself, contained in the previous will, to the trustee, upon the general trust reposed in him by the testator?

It is obvious, that the revocation of the direction to sell, has no effect whatever of this nature. It left the legal estate in fee, as well as the beneficial trusts, absolutely untouched, and amounts only to an arrangement respecting the mode in which the trusts are to be executed.

The contingent and executory devise in the codicil, is a revocation *pro tanto* of the devise in the will of the same estates: it is an indirect revocation. The last revokes the first because they are inconsistent, and for that reason only. It revokes therefore to the extent in which they are inconsistent, and no further. Now how far are they inconsistent?

The gift is "of his freehold estates to the son of his daughter, who shall first attain twenty-one." We are to assume that this devise is contingent and executory; that nothing vests till the event happens; that no estate or interest, either legal or equitable, passes, until a son attains twenty-one. What becomes of it in the meantime? The prior devise found in the will, remains unrevoked. The estate or interest continues where the will had placed it, that is, in the trustees.

We are of opinion, therefore, that until the contingency shall happen, which is to vest the freehold estate in a devisee by force of the codicil, the rents and profits of that estate go and belong to the surviving devisee in trust of the residue named in the will.

As to the last question put by your Lordships, we are of opinion, that any copyhold purchased by the testator *mesne* between the will and the codicil passes by the will.

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The will has the effect upon this subject, which it would have had, if it had been made at the date of the codicil : for many years this has been the rule. The cases are too numerous to require that any of them should be mentioned. A codicil confirming a will, brings the will down to the date of the codicil. As the codicil bears date on the 3d of March, 1821, so in effect does the will. Then as the residuary clause devises all his copyhold estates, the estates supposed in the question, being at that time his copyhold estates, must pass by it. There have been some cases in which the republication of a will by a codicil, has not had this effect. The case of *Strathmore v. Bowes*,\* is one. In these cases, it was manifest from the language of the codicil, that the testator did not intend to pass his lands purchased after the will.

Nothing of that kind is to be found in this codicil : it must therefore have the usual effect, and the will must pass these copyholds.

*Lord Eldon*.—The judges having given their opinions, in answer to the questions put to them, on this and the former occasion, it is sufficient for me to say, that I concur in all those opinions.

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\* 7 Term Reports, p. 482.

In the appeal on behalf of the children, the following order was made :—

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It is ordered and adjudged, that so much of the said decretal order as declares, that under and by virtue of the said will of the testator George Elwes, the said Defendant G. T. W. H. Duffield, as only son of the Plaintiff E. F. Duffield, by her husband the Plaintiff Thomas Duffield, living at the testator's death, took upon the testator's death, a presently vested equitable estate in fee, in the testator's freehold and copyhold farm and estate in Southwood Park, and freehold farm and estate at Haverhill, specifically devised by his will: subject to be divested by the death of the said G. T. W. H. Duffield under the age of twenty-one years, or by the birth of a second son of the Plaintiffs; and so much of the said decretal order as declares, that upon the birth of the Defendant Henry Duffield, the second son of the Plaintiffs, the said equitable estate of the said G. T. W. H. Duffield was divested, and that the said Henry Duffield took a vested equitable estate in fee, in the said Southwood Park and Haverhill estates, subject to be divested in the event of the said Henry Duffield dying, or becoming neither the second nor only son of the Plaintiffs, before he attains the age of twenty-one years be reversed: and it is declared, that no estate, according to the true construction of the will, would vest in any son, prior to his attaining the age of twenty-one years: and it is further ordered and adjudged, that so much of the said decretal order as declares, that such of the rents and profits of the said estates at Southwood Park and Haverhill, as

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accrued before the birth of the said Henry Duffield, belong to the said G. T. W. H. Duffield, subject only to the allowance for his maintenance directed by the said will; and that such of the said rents as accrued since the birth of the said Henry Duffield, belong to the said H. Duffield, subject only to the allowance for his maintenance directed by the said will, be also reversed; but without prejudice to any question, with respect to the application of the rents and profits, or any part thereof, for the purpose of maintenance: and it is also declared, that the devise of the said testator's residuary freehold estates to trustees made by his will, is revoked by the codicil, subject to what is hereinafter stated, respecting the intermediate rents, issues, and profits thereof: and it is further ordered and adjudged, that so much of the said decretal order as declares, that under and by virtue of the said codicil, the Defendant G. T. W. H. Duffield, the eldest son of the Plaintiff E. F. Duffield, upon the testator's death, took a presently vested legal estate in fee, in all the testator's freehold property, lands, tenements and hereditaments, (except only the said Southwood and Haverhill estates specifically devised by his said will,) subject to be divested in case of the death of the said G. T. W. H. Duffield, under the age of twenty-one years; but without prejudice to the question, how far such estate may be affected, in case the said Defendant G. T. W. H. Duffield should not, on his attaining his age of twenty-one years, change his name for that of Elwes, be also reversed: and it is further ordered and adjudged, that so much of the said decretal order as declares, that the rents and profits of

the said freehold property devised by the said codicil, accrued since the said testator's death, belong to the said G. T. W. H. Duffield, be also reversed : and it is further declared, that no son of the testator's daughter, under the effect of the codicil, took a presently vested estate in the testator's said freehold estates, but that the same will belongs to the son of the testator's daughter, who shall first attain the age of twenty-one years ; and according to the testator's direction, change his name for that of Elwes : and it is further declared, that the copyhold estates of the testator, purchased after the execution of his will, and before the execution of his codicil, if such be, had passed by the effect of the will to the person or persons, trustee or trustees, to whom copyhold estates are devised by the will, upon the trusts in the will mentioned : and it is also further declared, without prejudice to any question respecting maintenance, that the intermediate rents, issues, and profits of the testator's freehold and copyhold estates at Southwood Park and Haverhill, and his other freehold estates devised by the codicil, during the suspense and until the vesting of the executory devises thereof respectively, are to be considered, according to the effect of the will and codicil, as belonging and devised to the person or persons, the trustee or trustees, of the testator's residuary estates in his will mentioned, upon the trusts by the said will declared thereof : and it is further ordered, that with the reversals and declarations aforesaid, the cause be remitted back to the Court of Chancery, to do therein what is just, and in all respects consistent with this judgment.

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In the appeal on behalf of Mr. and Mrs. Duffield, in the right of Mrs. Duffield as heir at law, an order was made, containing the same declarations as in the order upon the appeal of the infants, and concluding thus:—

It is ordered and adjudged, that the appeal so far as it seeks a declaration that the intermediate rents, issues, and profits of the estates at Southwood Park and Haverhill, and the freehold estate devised by the codicil, belong to the Appellants, in right of the Appellant E. F. Duffield, be dismissed, &c.

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## APPENDIX.

## SCOTLAND.

(COURT OF SESSION.)

GORDON OF CLUNY - - - - - *Appellant.*JOHN ANDERSON - - - - - *Respondent.*

ET E CONTRA.

A. being a tenant in possession of a farm, which he held after the expiration of a lease, made a proposal by missive, to take a new lease, upon the conditions of an offer made by W. for another farm belonging to the same estate. W. had engaged to enter into a lease, which was to contain "all the regulations *to be laid down for the estate.*" G. the owner of the estate, by letter, accepted the proposal of A. on the footing of the offer of W. and "the general conditions *laid down* by him "for the whole estate;" and this letter of acceptance provided, that a lease should be executed as soon as the other leases of the estate could be got ready. Three years after this proposal and acceptance, a document entitled articles and conditions, was signed by G. and various other proposed tenants of the estate, but not by W or A. By one of these conditions it was provided, that "all the fodder should be used upon the "farm, and none sold or carried away at any time." This document concluded by providing that the leases on the estate were to be granted upon, and to refer to the conditions therein contained. A few days after the signature of this document, a draft tack with various blanks, but containing a reference to the articles and conditions, and an obligation to



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perform them, and a consent to the registration of them, was signed by the tenants, including W. but not A. He did however, two years afterwards, sign this draft tack, which was never extended, or otherwise executed.

Held, that the draft tack as signed by A. was a probative document, and not a new contract between the parties, but referable to the preceding agreement and conditions; and that the condition prohibiting the sale or removal of straw, &c. applied to the last year of the term, and the way-going crop. The draft tack not having been produced on the first hearing of the cause, held, that the Appellant was liable for all the costs consequent upon the non-production.

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**THE** Appellant was the proprietor of a large estate called Slains, consisting of a number of farms, subject to leases, which expired in 1801.

The Respondent being in possession, after the expiration of one of these leases, of a farm belonging to the Appellant, made proposals for a new lease, in a missive dated on the 28th of May, 1801,<sup>\*</sup> containing nine articles of conditions; by the last of which, he proposed to be bound to the conditions of an offer made by Mr. Wilkins for another farm belonging to the Appellant.

The offer of Mr. Wilkins had been made on the 23d of May, 1801, in a note or missive, containing various conditions, of which the last was in these terms:—"I engage to enter into a lease on "the foregoing terms; the lease to contain all "the regulations *to be* laid down for the estate, if "by *that* \* time digested and ready."

\* No other time is stated in the conditions, but that which appears in the paragraph in the text, viz. that of making the lease.

By a letter addressed to the Respondent on the 2d of June, 1801, the Appellant prefixing a copy of the offer, added:—"I accept thereof, on the footing of Mr. Wilkins's offer, and the general conditions *laid down* by me for the whole estate;" and then after stating other stipulations, the letter concludes thus:—"A lease to be prepared and executed, as soon as the other leases of the estate can be got ready."

On the 5th of May, 1804, a document was drawn up, entitled "articles and conditions laid down by Mr. Gordon, for letting the estate of Slains." It consisted of twenty-one articles. The sixteenth article was in the following terms: "The whole fodder to be used upon the ground, and none sold or carried away at any time, hay only excepted, and all the dung to be laid upon the farm the last year of the lease." At the end of the articles these words were added:—"These are the articles and conditions referred to in the several offers made by us respectively, for different farms on the estate of Slains, of the dates hereto annexed to our respective subscriptions." The tenants to the number of twenty-one, subscribed the articles; but they were not subscribed either by Anderson or by George Wilkins. Then the articles proceeded in these terms:—"The above are the general articles and conditions, on which the leases on the estate of Slains are to be granted by me, and to be referred to therein."

The document at the conclusion had the signature of the Appellant and witnesses.

On the 12th of May, 1804, a draft tack between the Appellant and the tenants, was prepared in

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the following terms:—" It is contracted, agreed,  
 " and enacted, between Charles Gordon of Cluny  
 " Esq. heritable proprietor of the estate of  
 " Slains, of which the lands and others after  
 " mentioned are a part, of the one part, and  
 " of the other part, in manner and  
 " to the effect following, that is to say, the said  
 " Charles Gordon in consideration of the yearly  
 " tack duty of money and victual underwritten,  
 " and of the other prestations, conditions, stipu-  
 " lations, and reservations, specified and con-  
 " tained in a separate paper of general articles,  
 " subscribed by him, as relative to his leases of  
 " said estate, and to be held as part of these  
 " presents, hath set, and in tack and lease let, as  
 " he hereby sets, and in tack and assedation lets  
 " to the said and his heirs, se-  
 " cluding assignees or sub-tenants, legal or vo-  
 " luntary, without the express consent of the  
 " proprietor, all and whole lying in the  
 " parish of Slains, and county of Aberdeen, as  
 " the same have been marched and bounded ac-  
 " cording to a new arrangement and plan of said  
 " estate, made by Thomas Johnston, land sur-  
 " veyor, subscribed by the said Charles Gordon,  
 " and already subscribed, or *to be* subscribed by  
 " the said , with which contents and  
 " boundaries he holds himself satisfied, and that  
 " for the space of twenty-one years, and crops  
 " from and after the terms of Whitsunday 1801,  
 " which is hereby declared to have been the com-  
 " mencement of this tack, and the term of the  
 " said , his entry; which tack, *with*  
 " *and under* the several prestations, conditions,  
 " stipulations, and reservations, before and after

“ specified, and in the articles referred to, the  
 “ said Charles Gordon binds and obliges himself,  
 “ his heirs and successors, to warrant at all  
 “ points: For the which causes on the other  
 “ part, the said binds and obliges  
 “ himself, his heirs and successors, not only to  
 “ adhere to, obey, and perform the whole articles,  
 “ conditions, stipulations, and others contained in  
 “ the general articles regarding said estate here-  
 “ inbefore referred to, and held as part of these  
 “ presents, but also to pay, &c.” And then,  
 after various provisions made respecting rent, &c.  
 the draft concluded in the following terms:—  
 “ And both parties oblige themselves and their  
 “ foresaids, to implement and perform their re-  
 “ spective parts of the premises, and of the said  
 “ separate articles to each other, under the  
 “ penalty of 100*l.* &c., and consent to the regis-  
 “ tration hereof, and of the said separate articles,  
 “ as part, in the books of council and session,  
 “ Sheriff Court books of Aberdeen, or others  
 “ competent, &c.” This document was signed  
 by twenty-one tenants, including Wilkins, but  
 not Anderson: he however, signed it two years  
 afterwards.

The Appellant became entitled to the estate  
 some time before the expiration of the tack, and  
 having reason to suppose that the Respondent in-  
 tended to carry off the straw of the way-going  
 crop upon his removal, he obtained from the  
 sheriff of Aberdeenshire an interim interdict, to  
 prevent the Respondent's purpose; but the in-  
 terdict was afterwards recalled. The Appellant  
 thereupon advocated; and the Lord Ordinary in  
 respect of the decision of the House of Lords, in

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the case of the *Duke of Roxburghe v. Robertson*,\* ordered informations to the Court, adding in a note, "that in a case where the practice which " has so long subsisted in Scotland, is said to be " totally subverted by a judgment of the Court " of Review, it is necessary that both landlords " and tenants should be speedily acquainted with " the construction to be put upon such clauses, " &c."

At this time the Appellant had not produced in evidence, the subscription of the Respondent to the draft tack; and on this ground the cause was remitted *simpliciter*. This evidence was afterwards supplied by leave of the Court, on payment of costs: but the Court in May 1825, found " that " the sixteenth article of the general articles of " lease, could not be held as applying to the " crop of the last year of the lease; and that the " rights of the parties respecting the same, must " be regulated by the common law and usage of " the county, &c."

Against this decision there was an appeal and cross appeal.

For the Respondent in the original, and Appellant in the cross appeal, the question upon the construction of clause was given up; but it was argued that the draft tack was not a probative document; that the provision not to remove straw the last year of the term, operated as a new and distinct contract, and could not be considered as a condition, even if there were a sufficient reference to the conditions in the documents signed by the Respondents.

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\* 2 Bligh's Reports, 156.

For the Appellant.—*Mr. Wilson and Mr. Wright.*

For the Respondent.—*Mr. Keay and Mr. Miller.*

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*The Lord Chancellor.*—The argument upon the construction of the clause has been properly given up; but it is contended that it was not binding on the tenant Mr. Anderson; that he had not subscribed it, and that he had never seen it when the lease was granted, and when he had taken possession of the farm. But in his letter, he refers distinctly to the proposal made by Mr. Wilkins, which had been accepted by Mr. Gordon, and which was to include the general conditions laid down for the whole estate. The Court below did not originally think it necessary, to decide the general question upon the construction of the clause, whether it applied to the last year of the lease, because they were of opinion, that there was not sufficient evidence that those regulations had been adopted by the tenant Mr. Anderson. He did not subscribe the paper of articles and conditions, and there was then no evidence that he had seen it. Afterwards the draft tack being produced, Mr. Gordon was permitted, on payment of costs, to make a new case. It then became, and is now the question, whether there was evidence to shew that the articles had been adopted? On the production of the draft tack, the Court below were of opinion, that the articles had been adopted by Anderson: the House will probably be of the same opinion.

It has been argued that this is a new contract, and if so, not having been entered into according

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to the forms and ceremonies required by the law of Scotland, it could not be binding upon the parties. It was said, that Mr. Anderson was in possession of the property as tenant, under the original agreement, and that if this were an entire new contract, not being executed in the manner required by the law of Scotland, it could not have varied the original terms. But this is not to be considered a new contract. It is nothing more than a completion of the first contract. There were certain terms and stipulations, by which one of the farms was to be held by Mr. Wilkins: these terms and stipulations were also to be binding on Mr. Anderson. There was a reference by one contract to the other. If those are not the terms and stipulations, there are no terms and stipulations existing with respect to the farm; but Mr. Anderson having subscribed this paper, although not until four years after he entered on the farm, has identified it as containing the regulations by which he was to be bound. It is to be viewed as nothing but a recognition by Mr. Anderson, that those are the regulations referred to in this contract. In this respect, the judgment should be affirmed. Upon the construction of the clause, it must be reversed. The costs consequent upon the non-production of this instrument in the first instance, were properly thrown upon Mr. Gordon. That part of the judgment should also be affirmed.

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## SCOTLAND.

(ADMIRALTY AND COURT OF SESSION.)

STRACHAN and GAVIN - - - - *Appellants.*PATON and others - - - - *Respondents.*

The owners of a ship applied by letter to S. and G. shipwrights, to lengthen and repair the ship, requesting them "to furnish an estimate of the probable cost, and also to note the prices of timber, and the rate of wages." The letter contained this passage:—"The timber must be all English oak, and if you have a sufficient quantity on hand for the repair of the ship, besides her lengthening." S. and G. by letter, in answer, say, the expence of lengthening, on a rough calculation, will be £900.; and as the vessel would require other repairs, it would be the best for both parties, to do the whole by day work. The letter then contains this passage:—"The captain will have it in his power to keep an exact account of the articles expended, and to turn off any workmen that does not please him. We have on hand an excellent assortment of English oak timber of a suitable size for the vessel." A note of prices was added, "wages per day, 3s. 4d.; common English oak timber per foot, 5s." In a subsequent letter from the owners, announcing the dispatch of the ship, this postscript is added:—"As it is understood that nothing is to be put into the ship but English oak timber and Dantzic oak plank, to which you must bind yourselves by letter, &c." To this S. and G. answer thus:—"With respect to the materials, we have a good stock of English timber and Dantzic plank, and little or no Hamburgh; so that Captain Young will have it in his power to take what he likes best." In a subsequent letter, the agent of the owners says:—"I hope you will put on her the best of materials, and also the best of workmans hip."



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The repairs were superintended by the captain, the carpenter, the master, and a part owner of the ship, and were completed in 1807. While the repairs were going on, the wages of carpenters were increased, by order of justices, to 6*d.* a day. Immediately after the completion of the repairs, the ship sprang a leak of an alarming description on her return to port, when she was repaired by the owners, upon a notice given to the builders, who sent their foreman to inspect. After these repairs, the vessel was proceeding on a voyage to Davis Straits, but was obliged to put back on account of her leaky condition, and was detained twenty-two days on repairs, when the season being too late for the fishery in Davis Straits, she sailed on a fishing voyage to Greenland, and brought home a short cargo. These transactions took place in 1806 and 1807. In 1813, after various legal proceedings, upon inspection of the ship, it appeared that American oak had been used in the repairs of the ship; that two of the bolts had been driven and clenched imperfectly; that there was one hole without a tree-nail; and that the vessel after the lengthening and repair, had increased in the midships five feet in width.

Held, under these pleadings and proofs, that the shipwrights had no right to charge in their account, the additional 6*d.* per day for wages, nor for the price of superior oak timber; that they were answerable in damages, for having used American instead of English oak, for the repairs done by the Respondents, and for the supposed loss in the fishing voyage, consequent upon the detention for repairs.

Held also, that the costs were properly given against the Appellants, although they had a judgment for a balance after allowance of all the deductions for damages.

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**T**HE Appellants were shipwrights at Leith. The Respondents were partners in a whale fishing company at Montrose.

In 1806, the agent of the Respondents applied by letter to the Appellants, requesting them to furnish an estimate of the probable cost of length-

ening and repairing a whaler, called the Eliza Swan. The letter contained the following passage:—"I am required also to request you to "note the prices of timber, planks, &c. and the "rate of wages, together with your dock dues: "the timber must be all English oak; and if you "have a sufficient quantity on hand for the "repair of the ship, besides her lengthening, &c." The Appellants, by a letter, in answer to this application, say, that the expence of lengthening cannot be estimated correctly, without further information, but upon a rough calculation, it would be about 900*l.*; and as the vessel would require other repairs, it would be the best for both parties, to do the whole by day work. The letter then contains this passage:—"The captain "will have it in his power to keep an exact "account of the articles expended, and *to turn* "off any workmen that does not please him. We "have on hand an excellent assortment of "English oak timber, of a suitable size for the "vessel." A note of prices was added; and among others, "wages per day, 3*s.* 4*d.*, common "English oak timber per foot, 5*s.*" After some further correspondence, the agent of the Respondents informed the Appellants, that the ship would be with them in a few days, and adds this postscript:—"As it is understood, that nothing "is to be put into the ship but English oak "timber and Dantzic oak plank, to which you "must bind yourselves by letter, as you did not "mention in your letter of the 14th current, "the plank to be Dantzic." To this the Appellants answered:—"The Eliza Swan is not yet "arrived; we are all clear for her, and expect

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“ her up every tide. With respect to the materials, we have a good stock of English timber and Dantzic plank, and little or no Hamburg; so that Captain Young will have it in his power to take what he likes best: and we hope to be able to execute the work to the satisfaction of every one concerned.” After the receipt of this letter, the Respondents’ agent wrote thus to the Appellants:—“ I had a letter from Captain Young on the arrival of the *Eliza Swan*, and that she goes into dock on the 15th current; and hope you will put on her the best of materials, and likewise the best of workmanship on her, and return her as soon as possible.”

After this correspondence the ship was docked, the repairs were completed in January, 1807; having been personally superintended by the captain, the master, the carpenter, and a part owner of the ship. The charge for the repairs amounted to 2,685*l.* 3*s.* 8*d.*, of which 1,350*l.* were paid on account. During the repairs, the wages of carpenters were increased 6*d.* a day, by order of justices. The Respondents having refused to pay the remainder of the demand, alleging that the repairs had been inefficiently done, and not according to contract, an action was raised against them in the Court of Admiralty, concluding for payment of the balance of their bill with interest.

To this action, the Appellants put in defences, in which they objected to a charge in the account of 6*d.* a day additional for wages, and 6*s.* per foot for oak. They also raised a counter-action, and afterwards a supplemental counter-action, concluding that the Appellants should remove the foreign timber, which had been used in the

repairs, or that the Respondents might substitute British oak, at the cost of the Appellants, and that the Appellants might pay damages for the loss, which had been consequent upon the default in the repair of the ship, which consisted chiefly in repairs done by the Respondents in 1807, 1811, and 1814, and the deficiency of the cargo on the voyage to Greenland.

It appeared in evidence, that immediately after the completion of the repairs, on the voyage from Leith to Montrose, the vessel became so leaky, that she was in danger of being water-logged. At Montrose she was repaired by the Respondents; notice having been given to the Appellants, who sent their foreman to inspect the state of the vessel. After this repair, the vessel was proceeding on her fishing voyage to Davis Straits, but was obliged to put back on account of her leaky condition. She was at that time judicially inspected at Montrose : several deficiencies were discovered in the outward planking, both as to the planks and the caulking, and plugging of the seams and holes : no other defect is mentioned, as the result of this examination. The vessel was detained for these repairs twenty-two days, and was then employed in the Greenland Fishery, the season being too late for the fishery in Davis Straits, and she brought home a short cargo. There was proof that American oak had been used in the repairs, but that it had been selected by the Respondents. There was also proof that one of the tree-nail-holes and some of the nail-holes were empty : that two of the bolts were short, not going through the knees so as to clench, and pieces of bolts were driven from the inside, to

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give the appearance of being properly clenched ; that the caulking was found to be slack after the ship had left the repairing docks ; and that she had become five feet wider in the midships, but from what precise cause was not ascertained, otherwise than by the opinion of Mr. Stone, in his report as stated below.

The inspection of the vessel, from which principally the evidence in the cause was furnished, took place in the year 1814. The actions being conjoined, the Judge-Admiral pronounced a judgment, by which he found that the Appellants were not intitled to charge for work or timber, any higher rates than were specified in the letter of the 14th of July ; that they were bound to furnish the sorts of timber agreed to, but were intitled nevertheless to charge for the American oak used in the repairs. He farther found that the Respondents were intitled in the counter action, to the expense of the repairs at Montrose, the wages of the captain and crew during the repairs, and the expense of the repairs done after the Greenland voyage. But he repelled the claim for damages, for the loss alleged to have been sustained by the unsuccessful fishing in the Greenland voyage, and the claim for repairs with English instead of American oak. This judgment was afterwards brought before the Court of Session, where the Lord Ordinary having advocated the cause, and having in part reversed the judgment of the Judge-Admiral, the Respondents reclaimed to the Inner House, who remitted the case to Mr. Stone, the master builder, at the dock yard at Deptford, to consider the same, with the proof particularly as regards the manner in which the bolts were

driven and clenched, and the length and sufficiency of the beams.

Mr. Stone made a report, stating his opinion, collected from the proofs in the cause; which opinion as to the bolts, was to the effect before set forth in the statement of the evidence; and as to the length and sufficiency of the beams, he says: "I am at a loss to account for any motive (on the part of the Appellants,) in allowing such a thing; but I *admit the probability*, that the beam said to be five inches short, *might have been* so much short, or nearly so when put in." He then gave an opinion in form hypothetical, but appearing to be founded upon evidence in the cause, "that the increase of width in the midships, was not the effect of working, but for want of a proper security to connect the beam to the side, or shortness of the beam when put into the ship; want of judgment in proportioning the quantum of fastening, or negligence in the execution of the work." As to the use of American oak, he said, "that experience had since proved, that in a very short time, oak of American growth becomes very defective, and is very subject to *fungi*."

Upon advising the cause with this report, in 1824, the Court approved the report; altered the interlocutor of the Lord Ordinary, as to the additional charge for wages and the price of timber, and as to the counter-claim of the Respondents, for repairs done by them in 1811 and 1814, the short fishing in 1807, and the use of American instead of English oak by the Appellants in the original repairs, and found accordingly, directing a condescendence as to particulars and amount.

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After this interlocutor, the parties agreed, (without prejudice to the question on appeal,) that 100*l.* should be taken as the damages for the short fishing, and the use of American oak.

The Court thereupon decerned accordingly.

The appeal was against this decision.

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For the Appellants.—*The Solicitor General (Tindal)* and *Mr. J. Campbell.*

For the Respondents.—*Dr. Lushington* and *Mr. Keay.*

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*The Lord Chancellor*, after stating some of the facts of the case, proceeded thus :—

The first question that will arise will be, whether or not the shipwrights at Leith, having instituted the suit against the ship owners for the recovery of the sum due for the repairs, amounting to 1,700*l.* any reduction should be made in consequence of the insufficiency of the repairs? According to the law of this part of the island, much that is insisted on the part of the Defendants, would have been the subject of a cross action; but no such question arises according to the state of the pleadings in this case.\*

The expences incurred after the return of the vessel to Montrose, ought to fall upon the Appellants. The work became necessary, in consequence of their default. They sent their foreman, upon a notice, to view the state of the vessel; and no witnesses have been examined to rebut the evidence of the Respondents on this point. The same argument applies to the repairs done

\* See p. 62.

after the return of the vessel from the first Greenland voyage. Upon taking off the doubling, she was found to be in an imperfect condition. What was then done was absolutely necessary, and resulted from the omission of the Appellants.

In the year 1814, which is several years afterwards, the vessel was inspected, and it was then those defects were discovered. The vessel was examined by persons every way competent to form a judgment. It is sworn, that at that period some of the beams that were put in were too short, some of the bolts, (one of them, if not more,) were too short, and bolts were driven in on the other side, to give them the appearance of having passed through. The whole of that evidence was submitted by the Court below to Mr. Stone the master shipwright, at Deptford dock-yard, and he has made a report. I do not at all concur in the observations made at the bar upon that report, for I find no fault with regard to the general scope and tenor of it;—he is of opinion, that those defects discovered in 1814, were the effects of the imperfect manner in which the work had been done by the shipwrights at Leith. I am ready to make every allowance for the interval of time that has elapsed from 1806 to 1814, and particularly with respect to a vessel engaged in the Greenland fisheries; but still, looking at this evidence—paying attention to it, and making every fair and just allowance—the impression upon my mind is, that it is satisfactorily made out, that those defects which were discovered in the year 1814, and which were then repaired, are properly referable to the original omission of the shipwrights; and if so, I think they are bound

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to make compensation. The Court below were of that opinion. I concur in that opinion, and submit to your Lordships that it would be proper in that respect, to confirm the opinion of the judges in Scotland.

Your Lordships will not think it necessary for me to read the evidence to you. It is very voluminous, and in detail. I state fairly, that, after much attention, that is the result of the impression it has made upon my mind. I think the evidence is all one way. There is much reasoning, and very good reasoning, on the other side; but almost all the evidence is in favour of the present Respondent.

Another question that arose, which, though not a question very material in point of amount, is not immaterial in principle, was this: The vessel was detained upon the first repair twenty-two days at Montrose. She afterwards sailed upon her fishing voyage, and came back with an imperfect cargo. The owners of the vessel claim compensation upon this account. The answer that is given, or at least one of the answers, is this, if the vessel had sailed upon the original destination, you are not sure, upon so precarious an adventure, that she would have come back with a larger cargo. But if a vessel is detained for twenty-two days, at a time when she ought to have been on her voyage, (and she was detained these twenty-two days in consequence of the deficiency of the repairs of the shipwrights,) and the parties have been deprived of the fair chance of gaining the advantage resulting from the use of their vessel during that time, I apprehend they are entitled to compensation in the shape of

damages. I am quite satisfied, upon an action so framed in this part of the island, that damages would be recovered, for the parties had lost for twenty-two days the use of their vessel.

I do not mean, nor do the parties who are concerned in this appeal mean, to impute moral blame to the shipwrights, for using American oak instead of English oak, because at that period, according to the evidence, it was supposed that American oak was as good as English oak; and the evidence states that the price was about the same; but it has turned out in the result—the evidence establishes the fact—that American oak decays much more rapidly than English oak, and in the present instance, the orders were “English oak.” These orders were accepted by the shipwrights, and by the acceptance of those orders it was incumbent upon them to see that nothing but English oak should be used: if they took upon themselves to use any other, they have been guilty of an infringement of the contract; and if they have been guilty of an infringement of the contract, they are liable to an action, and liable to make compensation in damages, for the consequences that have resulted from the breach of that contract. The only ground upon which it is resisted is, that Captain Young was present at the time. But I do not find that Captain Young was vested with any authority, to dispense with the terms of this written contract, with regard to the particulars I have before alluded to; and if the parties take upon themselves to use American instead of English oak, contrary to the terms of their contract, supposing it to be as good,—if it has turned out that their judgment is erroneous,

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they are bound to make compensation to the ship owners.

There are two other points remaining for consideration. Before the vessel was sent to Leith, the company took the precaution to direct their agent to write a letter, to ascertain the probable expence of lengthening the vessel, and to ascertain the rate of charge, with respect to the wages and materials. For a part of the time those wages were charged at 3*s.* 4*d.* and for a part of the time an increased rate of 6*d.* was charged; and the ground upon which this increased charge was made was, that in fact, while this work was going on, there was a general increase of wages at the rate of 6*d.* a day; but looking at the distinct and precise terms of this contract, if any loss arises from that increase of wages, it ought to fall, not upon the ship owners, but the shipwrights. The parties sent to know the rate of wages. "What do you mean to charge?" "3*s.* 4*d.* a day." It does not appear that 3*s.* 4*d.* a day is the price that is paid to the men: 3*s.* 4*d.* is the price that the shipwrights are to charge the ship owner. There is no evidence to shew the actual price paid to the labourers by the shipwrights. I consider that they contract, "While this work is going on, we will charge at the rate of 3*s.* 4*d.* No matter what contract we have made with our men. We may agree with them by the day, by the week, or by the year. We may employ our apprentices, who are perhaps not paid at all, or at a very low rate. We shall charge you 3*s.* 4*d.*" If an increase has taken place before this work was completed, the loss, I think, ought in justice to fall upon the shipwrights.

The other point is as to the common English oak. That is charged in the note at 5s. and part of the timber has been charged at the rate of 6s.; and the ground upon which that charge is made is, that it was oak of a superior quality, and ought to be charged at the rate of 6s. They were not justified in making that charge. When they say that common oak is to be charged at such a rate, the party is deluded, unless that is meant to apply to the general run of oak timber throughout the vessel. It was incumbent upon them to have stated, that the common oak timber was to be charged so much, but that it was necessary for certain purposes to use superior oak, to be charged at an increased rate. The Appellants saying the price was 5s. without making any distinction as to the use of any superior oak timber, must be considered bound by it. But the case does not rest here: they say for the beams, and the keel, and the keelson, and for the knees, superior oak timber is requisite: but upon the evidence it turns out, that in the keel and keelson, or in a great part of what they did, they did not use superior oak timber, which means superior English oak timber, but they used American oak; and it appeared also, as to some of the knees, that they were American oak. Therefore, I think upon the fact, that they are not entitled to have this charge sustained.

There is one remaining point, which relates to the expenses. The expenses of the proceedings have been, by the Court below, thrown upon the shipwrights. Now it is said at the bar, (and upon the part of the Appellants the case was argued

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by English counsel,) that that is not just and does not correspond with our practice in this part of the island, because the shipwrights have recovered a considerable part of their demand: they have recovered to the extent of 600*l.* and having recovered to that extent, it is very hard and unjust that they should have to pay all the expenses. But I think, in the first place, that the rules with respect to costs in this part of the island, are rules of practice; rules of law established with regard to our proceedings. We cannot well reason, from our practice, as to such questions in Courts in any other jurisdiction. But if we come to sift the question, I do not think the argument applies in the manner in which it is pressed. If this inquiry had taken place in England, there must have been two actions. The shipwrights must have proceeded in their action to recover their demand, and the ship owners must have brought a cross action for the damage they had sustained, by the imperfect manner in which the contract was executed; and these two actions must have gone to their termination as two separate actions. Upon the action for damages brought by the ship owners, if they recovered, they would have recovered the entire costs. Now when we advert to these proceedings, almost all the expenses result out of that part of the investigation. Therefore, applying the principle that prevails in this country, and the practice in this country, to the proceedings in this instance, it appears to me, that the result would be nearly the same. And with respect to the action brought by the shipwrights, the ship owner would have had an easy mode of obviating

the necessity of paying costs in that action. He would have said, "I claim to deduct two items; "that part of your charge for superior oak, and "that part of your charge for wages." He might have paid into Court the difference; and if the party had gone on to try the merits of the case, as far as it relates to these points, and he had failed, the costs of the action would have been thrown upon the shipwrights; and therefore, as, when we apply the principle that prevails here to this particular case, there would not be much diversity in the result, I propose that that part also of the decision should be affirmed.

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## SCOTLAND.

(COURT OF SESSION.)

POOR ISOBEL M'DIARMID with her }  
Husband - - - - - } *Appellants.*

JOHN and JAMES M'DIARMID - - *Respondents.*

J. M., a man eighty-three years old, being entitled under the provisions of a trust-disposition and settlement, to the annual produce of a fund, during his life, estimated at the value of £6,000. but subject to reduction, in the proportion of one-third, upon the event of a suit, executed a deed, by which he renounced all his interest in the fund, and assigned it to his daughter and her husband, to whom the reversion belonged, in consideration of an annuity of £40. a year, to be paid to him for life out of the fund, and his funeral expenses. In a suit instituted to reduce this deed, it was admitted that he was weak and infirm, and addicted to intoxication; and it appeared that the deed was drawn up by the agents of the daughter and her husband, and that no agent or other person was employed on the part of the father. Under these circumstances, the deed was held void and reduced, and the judgment affirmed on appeal.

  
**BY** a trust-disposition and settlement executed in 1813, by Angus M'Diarmid and his wife, making a provision for her, by way of annuity, in bar of her legal rights,—their heritable and moveable estate, in case Angus M'Diarmid should

leave no issue of his body at his death, or their afterwards failing, was limited to John and Catherine M'Diarmid, his father and mother, and the survivor, whom failing, to Hugh M'Diarmid, Christian M'Diarmid, and the Appellant Isobel, his brother and sisters, equally among them, their respective heirs, executors, or assignees. There was also a provision, that in case his mother should die, and his father marry again, his right should determine, and the estate devolve to his brother and sisters; in which case the father was to have right to the occupation of a house, and the trustees to pay him an annuity of 40*l.* during life.

In February 1823, Angus died, leaving his widow, his father, and the Appellant Isobel surviving. His mother, and Hugh and Christian M'Diarmid, his brother and sister, were dead.

The property left was estimated at 6,000*l.* The widow thinking her provision inadequate, instituted a suit to reduce the deed, and re-establish her legal provision.

In March 1823, a deed was drawn up by the agent of the Appellants, and by their direction, in which John M'Diarmid and the Appellants were made parties. It recited the trust-disposition and settlement, and an agreement, whereupon it provided, that in consideration of an annuity of 40*l.* a year, to be paid to John M'Diarmid out of the trust funds, he renounced all his right and interest in the trust property, except, &c. the annuity, and thereby agreed and declared, and bound and obliged himself, &c. " that  
" his right to the heritable and moveable estate, except, &c. (as to the annuity) should thenceforth  
" cease and determine, and that the same should

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“ devolve and belong, and he thereby gave, granted  
“ assigned, and disposed the same from him, &c. to  
“ the person or persons having right after him to  
“ the said heritable and moveable property by the  
“ deed of settlement.” There was a farther obligation on his part, to execute deeds in legal form to effectuate the agreement; and the Appellants on their part, bound themselves to pay to John M'Diarmid 40*l.* a year out of the trust-funds; and both parties thereby authorized the trustees to pay the annuity, and to give effect to all the provisions of the deed.

The draft of this deed was sent to the Appellants by their agent, with an intimation that it would be proper that some man of business should revise it on the part of John M'Diarmid, or that it should be read over and explained to him by some intelligent person, not interested in the matter.

The deed was executed on the 1st of April, no agent having been employed on the part of the father.

On the 7th of May following, he executed a deed in favor of the Respondent James M'Diarmid, with a power to set aside the former deed.

An action of reduction was thereupon brought by the Respondents against the Appellants, charging fraud on the part of the Appellants, in obtaining the agreement, and facility on the part of the Respondent John M'Diarmid in granting it; charging also want of consideration, enormous lesion, and that the deed was intrinsically irrational. The Appellants in their defence, admitted the age and infirmity of the Respondent John M'Diarmid, and that he was liable to get

intoxicated, that no agent was employed on his part, and that the amount of the trust-funds, deducting the widow's claim, would be about 4,000*l*. The Court finally sustained the reasons of reduction, and adjudged accordingly. The appeal to the House of Lords was from this judgment.

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For the Appellants.—*Mr. Fullerton* and *Mr. Wilson*.

For the Respondents.—*Mr. Keay* and *Mr. Miller*.\*

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Authorities for the Appellants.—*Smith*, Dec. 23, 1697, (4955); *Gordon*, Feb. 7, 1729, (4956); *Maitland*, Feb. 13, 1729, (4956, and *Craigie and Stewart's Appeal Cases*, April 20, 1732, p. 73); *Swintoun*, Dec. 10, 1679, (4962); *Mackie*, Nov. 24, 1752, (4963); *Scott*, Nov. 17, 1789, (4964); *Ersk. Inst.* 4, 1, 27.

Authorities for the Respondents—*Ersk.* 4, 1, 27; *Gordon*, April 28, 1730, (*Craigie and Stewart*, p. 47); *Murray*, Jan. 21, 1826, (4 *Shaw and Dunlop*, 374); *M'Neil*, May 26, 1826, (4 *Shaw and Dunlop*, 620, 2, *Shaw's Appeal Cases*, No. 29, and *MSS*).

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*The Lord Chancellor*, after stating the facts of the case, proceeded as follows :

It does not appear that any legal adviser whatever, was called in on the part of the Respondent, previously to the execution of this deed, although it was suggested by the solicitors on the part of the Appellants, that that was the course which ought to be taken. It does not ap-

\* The counsel for the Respondents were not heard.

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pear that any one of the trustees of this property was informed of the existence of the deed, although the solicitors for the Appellants, suggested that that was the proper course. Under these circumstances, the deed which was thus executed is the subject of a very strong suspicion ; but that suspicion is very much strengthened, when we come to look at the deed itself.

In the situation in which John M'Diarmid stood, he was entitled to an income arising out of the property, to the extent of upwards of 200*l.* a year. In another view of the case, he was entitled to the whole property and the disposition of it (during life.) The property amounted, as far as he was interested in it, to 3,000*l.* or 4,000*l.* The whole of this property was conveyed away by this deed, with the reservation of 40*l.* a year to John M'Diarmid for his life, without any equivalent whatever. . Considering the manner in which the deed was obtained, the situation of the party executing the deed, and the dispositions of the deed itself, you will view the transaction with very great suspicion.

But it is material to consider the frame of the deed itself, according to the substance of the deed. It was nothing more than a renunciation of property to which this old man was entitled. He gives up the whole of the property, reserving to himself 40*l.* a year during his life. It is nothing more than a relinquishment of property, and it ought to have appeared obviously on the face of the deed. But when you look at the deed itself, it purports to be an obligation or agreement between the parties; and the deed professes to give something as an equivalent for that renunciation

of property, being entitled an obligation and agreement on the back of the deed itself. The consideration is stated to be the grant of this annuity. There was no annuity granted ; it was nothing more than a retention on the part of this individual of property to which he was entitled. There was, in point of fact, no consideration whatever ; and yet on the face of the deed, it purports to be for the consideration of this annuity, which the parties do not bind themselves to pay, but which is to be paid out of the trust-funds.


Considering the situation of the individual himself, who executed the deed,—his character,—his age,—his infirmity,—his liability to be operated upon by the suggestions of those who were about him ; considering the manner in which that deed was obtained, no person having been called in to advise upon it ; and considering that the suggestions which were made by the solicitors for the Appellants themselves, as to the course which ought to be pursued, were disregarded ; considering also the frame of the deed, it appears to me, that there was abundantly sufficient to justify the decision of the Court below, who considered this transaction as an imposition and fraud on this old man.

One of the grounds stated by the Appellants for the purpose of justifying this transaction is this, that a provision was made for the widow of Angus by the original deed ; that she was dissatisfied with that provision, and that she had instituted proceedings for the purpose of reducing the original deed ; and it is supposed that the old man was apprehensive that if the original deed

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was set aside in this action by the widow, he would be deprived of all means of subsistence, and therefore that he was willing to make this species of compromise. But that was a gross delusion. If the widow had a right to set aside the deed, she had a right to set it aside only to the extent to which she was herself interested, and the rest of the deed must remain; and, as one of the learned judges stated in the Court below, that forms an additional reason for vacating this transaction, as having been founded in delusion on the part of this old man. The Court below were fully justified in the opinion they formed of this transaction. There is sufficient in the case, as it now appears, to justify the Court in setting aside this deed, under the circumstances under which it was obtained.

It may be satisfactory to your Lordships to know, that when this case was opened by the Appellants' counsel, a noble and learned Lord,\* who held the office to which I have the honor to succeed, was present, and paid great attention to every part of it. I have had some conversation with him upon the subject, and he has authorized me to state, that he perfectly concurs in the view I have stated to your Lordships.

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Judgment affirmed.

\* Lord Eldon.

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## SCOTLAND.

(COURT OF SESSION.)

GRAHAM and another - - - - *Appellants.*TEMPLER and others - - - - *Respondents.*

G. by trust-deed, disposed lands at his death to trustees, to convey to his first and other sons in succession, and the heirs male of their bodies respectively, and in default of such issue, to the first son of either of his daughters who should first attain the age of twenty-one years and his heirs; but in case his daughters should both die, and have no such son of either of them, to convey to G. and R. his nephews. The residue of his real estate he gave to the same trustees to sell, for the use of his daughters; and he assigned and disposed to the same trustees, for the use of his heirs and substitutes, &c. in the order in the deed mentioned, the charters, &c. and rents, "for now, and in all time coming."

Held, that the rents accruing between the death of the disponent, and the event on which the lands were to vest in a son of the daughter, belonged not to the daughters as heirs portioners, nor as disposed to them under the residuary clause of the deed, but were to be held in trust for the parties who should become entitled under the dispositions of the deed.

By a trust-deed executed in 1808, Thomas Graham granted, disposed, and assigned to, and in favor of himself during his life; and at his death, to, and in favor of his wife and other trustees, all his estates real and personal, according to their respective qualities, upon trust, for the pay-

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ment of an annuity to his wife, and a sum of 5,000*l.* to his daughter; and subject to those burdens, the trustees were to convey the estates to the first and other sons of the disponent in succession, and the heirs male of their bodies respectively; and in default of such issue, to the first son of either of his daughters, who should first attain the age of twenty-one years and his heirs; but in case his daughters should both die, and have no such son of either of them, to convey certain lands to George Graham and his heirs; and other lands, or an estate called Burleigh, to his nephew Robert Graham; and then upon further trust, to sell the residue of his real estate, and assign the produce of the sale, together with the residue of his personal estate, equally, "share and share alike as tenants in common, between his wife and his two daughters, for their separate use." The disponent then by the deed, assigned and disposed to himself and the trustees, for the use of his heirs and substitutes, and in the order thereinbefore mentioned, all his charters, &c.; and also the whole rents, fees duties, mauls, profits, and casualties thereto belonging, and tacks, if any be subsisting at the time, "for now, and in all time coming."

This deed was drawn up by an English conveyancer, and executed in England by the disponent, upon the eve of his departure for India. He afterwards resided partly, and died in England in 1819, leaving a widow and two daughters. The widow died in 1820. The suit in the Court below was commenced by the two daughters, who by an action raised against the trustees, claimed the by-gone and future rents of the lands of Bur-

leigh and Kinross, from the death of their father, until an heir should appear, entitled to take up the succession to those lands. These rents were so claimed, either as not disposed of by the deed, or as passing to them under the residuary clause.

The trustees in their defences contended that the rents passed together with the lands as accessories, and belonged to the heirs named in the deed.

The Lord Ordinary held that the direction (in the deed) was such, as necessarily to imply, that the conveyance of the land should not be made until after an event should have happened, and that there was no provision that the daughter's son should have the intermediate rents, or that in the intermediate time, it should be managed for his profit, and decerned in terms of the conclusions of the libel.

The trustees having reclaimed against this judgment, the Court altered the interlocutor and assolizied the defenders.

The appeal was against this decision.

For the Appellants were cited as authorities.—Hyslop, Fac. Coll. Jan. 18, 1811; Arkwright, J. D. Dec. 3, 1819; Niven, March 6, 1823; 2 Shaw and Dunlop, 250; Souter, Jan. 22, 1801, (No. 2, Imp. Will.); Earl of Stair, in D. P. May 24, 1826, June 19, 1827, MSS.

The counsel for the Respondents were not heard in argument, the Lord Chancellor having intimated an opinion that the clause assigning the rents was conclusive, and upon his motion and opinion the judgment was affirmed.\*

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\* See the English Case of *Duffield v. Duffield*, anté p. 342.

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## SCOTLAND.

(COURT OF SESSION.)

The INCORPORATION OF FLESHERS OF } *Appellants.*  
 GLASGOW - - - - - }

CHRISTIAN (NELSON) SCOTLAND - *Respondent.*

A trading corporation having by its bye-laws fixed a rate of allowance to be made to the widows of deceased members, subject only to variation upon a defect of funds, cannot exercise a discretionary power as to the rate of allowance, but may be compelled by process in the ordinary Courts of Justice, (no defect of funds being alleged) to make the allowance fixed in a bye-law in favor of the widow of a freeman, who had entered after the date of the bye-law in question, and paid upon his entry a sum of money to the funds of the corporation, and made a small annual payment to the time of his death.

The costs incurred by an investigation of a disputed fact not allowed to a party who had the judgment upon the general question of right, the fact being found against that party.

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IN 1807, the Incorporation of Fleshers in Glasgow recorded in their books, a resolution proposed by the deacon and masters, and adopted by the whole body of the ordinary members, " that  
 " the annual allowances to reduced members and  
 " widows, should in future, be to members who  
 " have carried on the Fleisher trade for five years,  
 " 12*l.* sterling; to members who have not carried

“ on the trade five years, 6*l.* 3*s.*; to pendicles,  
 “ (members not carrying on the trade) 3*l.*; to  
 “ widows of the first class, 8*l.*; of the second  
 “ class, 5*l.*; of the third class, 3*l.*; but with  
 “ power to the master-court to increase their  
 “ allowances as circumstances shall require, or  
 “ diminish the same, if the funds of the trade are  
 “ to be encroached on, or will not afford these  
 “ allowances.”

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In 1809, James Scotland, who had married the Respondent, entered as a member of the Incorporation, and paid upon his entry, 4*l.* 8*s.* 10½*d.* to the funds, and afterwards, until his death in 1819, paid annually a contribution of one shilling.

Upon the death of her husband, the Respondent raised an action before the magistrates of Glasgow against the Corporation, setting forth in her summons the facts before stated, except the resolution recorded in the books, to which she alleged that access had been refused by the Corporation. The summons concluded for payment of the yearly sum of 8*l.* sterling, or such other sum as should be found upon inspection of the regulations, to be the amount to which she was entitled.

The Corporation in their defences, contended, 1st. That the allowance was in their discretion, as a matter of charity, which could not be controlled by a Court of Justice. 2d. That the Respondent's husband had not carried on the trade for five years before his death, and therefore, conceding the first point, that she was not entitled to a larger allowance than an annuity of 5*l.*

Upon advising proofs, the magistrates citing

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*Finlay v. Newbiggin*,\* found that Corporations of tradesmen in royal burghs, were subject to the control of competent Courts, with regard to the application of their funds, to the legitimate purposes to which these funds were destined; and afterwards they found, that from the minutes of the Corporation, and other evidence, the Respondent's claim to aliment appeared to rest on the contract of the parties, express or implied, and not to fall under the rule recognized in the case of *Paterson v. the Corporation of the Skinners of Edinburgh*,† in which it does not appear that the deceased husband of the claimant had made any payment at the date of his entry, or any subsequent payments, on the condition, express or implied, of his widow receiving a corresponding aliment. Afterwards on advising additional proof, they found the pursuer entitled to an annuity of 8*l.* and decerned accordingly.

Upon advocacy to the Lord Ordinary, he reversed this judgment, on the authority of the case of *Paterson*. But the Respondent having reclaimed to the Court of Session, the interlocutor of the Lord Ordinary was varied; the Court decerning for the payment of the annual allowance of 5*l.* sterling, and allowed only the costs incurred in the discussion of the question of right.

Against this decision there was an appeal and cross appeal.

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For the Appellants.—*The Solicitor General* and *Mr. Fullerton*.

\* 15th Jan. 1793.

† 10th Feb. 1803.

For the Respondents.—*Mr. Keay and Mr. Miller.*


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*The Lord Chancellor.*—Upon the agitation of this question, two points have been submitted to the consideration of the various tribunals, before whom this question has been considered. One point, and a material point for consideration, is, as to whether or not this right can be enforced in a Court of Justice? Another question, and that is a question of fact, is, as to whether the Respondent is entitled to the 5*l.* annuity, or to the annuity of 8*l.* a year? With respect to the first and material point for consideration, it is to be recollected, that this was an agreement entered into between the members of this society; that after that agreement had been entered into, Mr. Scotland became a member of the society; made his payments as a member of the society; continued a member of the society till the time of his death; and became therefore a party to the agreement, and entitled to all the benefits of the agreement for himself, and for his widow in the event of her surviving.

There has been no dispute in the progress of this cause, as to the poverty of the claimant, as to her being in indigent circumstances, so as to entitle her to the benefit of this regulation. There has been no impeachment whatever of her moral conduct. It is admitted that she comes fairly within the rule; and the question is, whether, coming fairly within the rule, there being no exception on the ground of her not being indigent, there being no exception whatever to her on account of any impropriety of conduct, this so-

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ciety have a right arbitrarily to withhold this payment; because they can arbitrarily withhold this payment, unless there is a means of enforcing the payment through the medium of a Court of Justice? I apprehend this is to be considered as an agreement and an arrangement, between this society and every individual member of the society, and, so long as this arrangement continues in force, every member has a right to the benefit of it; and if that benefit is attempted to be withheld from him, he is entitled to come to a Court of Justice for the purpose of claiming redress.

This was the view of the case taken by the Court of Session, and accordingly they pronounced the interlocutor, against which this appeal has been preferred.

This judgment ought to be affirmed. The only argument that was pressed against it, in point of authority, arose out of the case of *Paterson* against *the Corporation of Skinners of Edinburgh*; but that case has no reference whatever to that before your Lordships. It is true, that was a case of aliment; but in the case of *Paterson* against *the Corporation of Skinners*, it appears, according to the facts of that case, that in the regulations which existed for the original constitution of that corporation, each individual case was considered by itself; that the claimant preferred her claim to the corporation—they considered the nature of her claim, and made her such allowance as they thought proper; and it appeared that they were in the habit, from time to time, of withdrawing those allowances, according to their own discretion, and their sense of the propriety

of the act. It is perfectly clear, therefore, that that case has no resemblance to a case like the present, where an arrangement was entered into with respect to a fixed amount, appropriated according to a certain course of payment, to which all the members of the corporation were parties.

With respect to the question of fact, as to whether the woman is entitled to the five or the eight pounds, I will not go through the detail of the evidence. I will only state generally, that after having looked with as much attention as I can into the subject, it is not made out in a manner satisfactory to my mind ; at least it is not made out and established in evidence, that her husband carried on the business of a flesher for a period of five years and upwards ; and that not being made out satisfactorily in point of evidence, the consequence is, that she cannot be entitled to claim more than the sum of 5*l.* a year.

With respect to the costs, the manner in which the costs have been arranged, appears to me also to be fair and equitable ; that part of the costs which arose out of the discussion of the question of right, has been allowed to the widow, but she has not been considered by the Court below, as entitled to those costs resulting out of the investigation of the question of fact, the decision as to the fact having been against her ; and they ought to be disallowed, provided you are of opinion, that the judgment of the Court on the other points ought to be affirmed. I should submit to your Lordships, therefore, upon the whole case, that the final judgment of the Court of Session

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should be affirmed, and both appeals dismissed. There is an original appeal by the corporation, and there is a cross appeal by the widow; the decision, therefore, I should recommend is, to dismiss both appeals, and I think upon the whole, it will be better that there should be costs on neither side.

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## SCOTLAND.

(COURT OF SESSION.)

MANNERS, MILLER, and others - *Appellants.*SIR D. HUNTER BLAIR, and others *Respondents.*

AND

BUCHAN and others - - - - *Appellants.*

The OFFICERS OF STATE, and SIR }  
 D. H. BLAIR and others - - - } *Respondents.*

The King by letters patent, granted to B. and B. their heirs and assigns, to be his only printers in Scotland for forty-one years, to use and enjoy with all its profits and privileges, so far as the same were consistent with the articles of the Union, and especially the sole privilege of printing in Scotland, Bibles, (*Biblia Sacra*) Testaments, the Psalms, the Book of Common Prayer, Confessions of Faith, the greater and lesser Catechisms in the English tongue. The letters prohibited all other persons, subjects and foreigners, to print in or import into Scotland from any parts beyond the seas, any of the said books, without the licence or authority of B. and B. their heirs, assigns, and substitutes, under pain of confiscation.

Held, that the patentees had under this patent, the exclusive right of printing in Scotland, all the books enumerated in the patent, and that the received English translation of the Bible was within the terms of the patent, and could not be sold in Scotland without the authority of the patentees, although the prohibition in terms extended only to importation from parts beyond seas.

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IN the year 1785, the office of Printer to his Majesty for Scotland, was granted in reversion to the late Sir James Hunter Blair, Baronet, and



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the Respondent, Mr. Bruce. Sir James Hunter Blair was succeeded in his right as joint patentee, by the other Respondent, Sir David Hunter Blair.

By the patent of appointment to this office, which bears date on the 2d November, 1785, the commencement of the right is declared to be from the expiry of the then existing patent to Alexander Kincaid, which event took place in the year 1798, and from thence to endure for forty-one years.

By this writ, which is in the form of a commission or letters patent under the Union Seal, his Majesty nominates, constitutes, and appoints,  
 “ *Memoratos Jacobum Hunter Blair, et Joannem*  
 “ *Bruce, conjunctim, hæredes eorum, substitutos, seu*  
 “ *assignatos, solos et unicos nostros architypographos,*  
 “ *in illa parte regni nostri Magnæ Britanniae Scotia*  
 “ *vocata; idque pro spatio quadraginta unius anno-*  
 “ *rum, computando ab et post expirationem diplomatis,*  
 “ *pro præsentis existens, præfato Alexandro Kin-*  
 “ *caid, pro simili spatio quadraginta unius annorum*  
 “ *concessi; cum plena potestate ipsis Jacobo Hunter*  
 “ *Blair, et Joanni Bruce, conjunctim, eorumque*  
 “ *hæredibus, assignatis, seu substitutis, antedictis,*  
 “ *præfato munere et officio, durante spatio antedicto,*  
 “ *utendi, exercendi, et gaudendi, cum omnibus profi-*  
 “ *cuis, emolumentis, immunitatibus, exemptionibus,*  
 “ *et privilegiis, quibuscunque eidem spectantibus, in*  
 “ *quantum cum articulis Unionis, legibusque Magnæ*  
 “ *Britanniæ nunc existentibus, congruunt: Et spe-*  
 “ *ciatim, solum et unicum privilegium imprimendi, in*  
 “ *Scotia, Biblia Sacra, Nova Testamenta, Psalmo-*  
 “ *rum libros, libros Precum Communium, Confes-*

“ *siones Fidei, majores et minores Catechismos in*  
 “ *lingua Anglicana ;—necnon solam potestatem impri-*  
 “ *mendi et reimprimendi acta Parlamenti, edicta,*  
 “ *proclamationes, omnesque alias chartas in usum*  
 “ *nostrorum publicorum in Scotia officiorum impri-*  
 “ *mendas : Et generaliter omne quod ibidem publi-*  
 “ *candum erit, auctoritate regali, imprimendi et*  
 “ *reimprimendi: Prohiben. per præsentés, omnes*  
 “ *alias personas quascunque, tam nativos quam ex-*  
 “ *traneos, imprimere vel reimprimere, seu imprimi*  
 “ *seu reimprimi in Scotia causare, vel importare seu*  
 “ *importari facere in Scotiam, a quibusvis locis trans-*  
 “ *marinis, ullos dict. librorum, et chartarum publi-*  
 “ *carum supra mentionat. absque licentia vel auctori-*  
 “ *tate a dict. Jacobo Hunter Blair et Joanne Bruce,*  
 “ *hæredibus eorum, assignatis, vel substitutis, sub*  
 “ *pæna confiscationis omnium talium librorum, char-*  
 “ *tarumque publicarum, ita impress. seu importat.*  
 “ *in Scotia; unius eorund. dimidii ad nos, alteriusque*  
 “ *in usum dict. Jacobi Hunter Blair, et Joannis*  
 “ *Bruce, eorumque antedict.”*

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Under these letters patent, the Appellants in the first appeal, had obtained an interdict against the Respondents, restraining them from importing or selling, or exposing to sale, any of the books enumerated in the letters patent. Against this decision, Miller and Mannors appealed to the House of Lords, and upon the hearing in 1825, after observing that the only question substantially discussed in the argument of counsel, had turned principally on the language of the patent, which, although it conferred the sole right of printing in Scotland, yet the prohibition was only of printing in Scotland, or importing from places

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beyond the seas, *Lord Gifford* proceeded as follows :—

In considering this case, since it was argued, it appears to me, that a very important question has not been fully discussed. I apprehend, that the prerogative in this country, to grant the right of printing Bibles, New Testaments, &c. belongs to the King as supreme head of the church, and he only has a right to authorise the publication of the Book of Common Prayer, and the liturgy of the church.

Now this interdict applies not only to Bibles, New Testaments, Psalm Books, and Books of Common Prayer, which I apprehend mean books of English communion, but Confessions of Faith, (whether the Scotch Confession of Faith or the thirty-nine Articles does not appear), or larger or smaller Catechism, (what Catechisms they are does not appear). With respect to some of those works, it may be, that the prerogative of the Crown of Scotland may be larger than the prerogative of the Crown of England. But upon looking into the statute of 1690, by which the church government in Scotland was settled, there is this remarkable passage with respect to the Bible :—

Section 8. “ The Old Testament in Hebrew,  
 “ (which was the native language of the people  
 “ of God of old), and the New Testament in  
 “ Greek, (which, at the time of the writing of  
 “ it, was most generally known to the nation),  
 “ being immediately inspired by God, and by  
 “ his singular care and providence kept pure  
 “ in all ages, and therefore authentical, so as  
 “ in all controversies of religion, the church

“ is finally to appeal unto them: But because  
 “ these original tongues are not known to all the  
 “ people of God, who have right unto and interest in the Scriptures, and are commanded in  
 “ the fear of God to read and search them, therefore they are to be translated into the vulgar  
 “ language of every nation unto which they come,  
 “ that the word of God dwelling plentifully in  
 “ all, they may worship him in an acceptable  
 “ manner, and through patience and comfort of  
 “ the Scriptures, may have hope.”

Now I cannot find, that by any Act of the Crown of Scotland, or the Government of Scotland, there has been any authorized translation of the Bible for the use of the people of Scotland. I have been unable to find such, if any there is. I believe there is none. Then comes the question, Whether, supposing the privilege of the Crown in Scotland was the same as in England, to authorize a translation of the Bible, yet, not having done so, is it competent for the Crown of Scotland to say, you shall not import into Scotland a translation of the Bible authorized by the law of England? With respect to the Book of Common Prayer, if it alludes to the Book of Common Prayer of England, that is no part of the church establishment of Scotland; and has the Crown of Scotland the privilege to say, that that which is the form of the liturgy of the church of England, with which they have nothing to do, shall not be sold in Scotland, unless printed by the king's printer in Scotland? With respect to the Confessions of Faith, there was a Confession of Faith published in 1690, (which is the Con-

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fession of Faith adopted in Scotland, and authorized by the Crown), and the Crown has, as it was contended, and not denied, the same sort of privilege in Scotland as to the printing Acts of State, and those particular works which are peculiar to the church of Scotland, if there be any such: but has it the privilege of prohibiting the printing or selling in Scotland, the form of prayer of the church of England, with which form of prayer they themselves say, they have nothing to do in Scotland? So, as to the Psalms, there may be Psalm Books in Scotland, which are peculiarly used by the church of Scotland. Whether they have the power of preventing surreptitious copies of them, I know not. Then, as to the larger or smaller Catechism, it is possible they may have such works. These questions appear to me important, and perhaps I ought to take blame to myself, for not, at the time of the argument, having suggested these difficulties; but they did not then occur to me, for my attention was turned to the prohibitory clause. A good deal of the argument turned upon the case cited at the bar, which was said by the Appellants, to be the converse of this. In that case\* it was decided, that the king's printer in England, had a right to prohibit Bibles printed in Scotland, from being circulated in England, because it would be an infringement of the prerogative, which conferred the right upon a particular individual; and passages were cited from the judgment pronounced by the Lord Chancellor. He was of opinion that the power

\* *Univ. of Oxford and Cambridge v. Richardson*, 6 Ves. 689.

was reciprocal. He seemed to admit, that the Scotch printer could prevent the English printer from selling the English Bibles, or Book of Common Prayer, in Scotland; but the attention of the Lord Chancellor, and the noble Lord who assisted, was not drawn to the rights of the church of Scotland; nor do I see any thing in the judgment, that warranted the conclusion that he had formed a decisive opinion upon that point, but there are passages that are thought to bear that way.

It seems to me, with a view to save expense to the parties, and the delay that would take place, that it would be better for me to ask your Lordships to adjourn the case till the next session of Parliament, and have a farther argument upon this question, which affects the privilege of the Crown of Scotland, exercised in Scotland over works of this nature. Your Lordships have had an argument directed to the various species of works interdicted by this interlocutor, some of which may, for ought I know, come within the prerogative of the Crown of Scotland, conferring a monopoly upon the printer; but I do not profess to have formed any opinion upon the subject. It is of great importance to consider, whether the prerogative of Scotland can extend to a translation of the Bible, which the Crown of Scotland has never authorized itself. If it has, we shall be informed of it. Is it the translation printed in England? or what translation of the Bible is it, which the king's printer in Scotland has the sole privilege of printing? Is it every Bible, or the English translation? I apprehend the

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principal question in this case, will turn mainly upon the printing of the Bible and the New Testament.

I therefore propose to your Lordships to adjourn this case till the next session.

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The case was accordingly adjourned.

In the mean time, the question came under discussion in a similar suspension and interdict presented to the Court of Session by the King's Printers against Buchan and others, members of the Edinburgh and Glasgow Bible Societies. The Lord Ordinary in that case, "in respect of the "chargers (Buchan and others) having failed to "point out any distinction between the matters at "issue in the present process of suspension, and "those determined after the fullest discussion and "consideration by the first division of the Court in "the case of the *King's Printers v. Mannors* and "*Miller*, and other booksellers in Edinburgh, and "that no documents which appear to the Lord "Ordinary materially to affect the grounds of "that judgment, are now founded on, which were "not before the Court as aforesaid, or that any "allegations in point of fact, are made by the "chargers, different from those which were made "in the said case before the Court," suspended the letters simpliciter, continued the interdict and decerned. The Court, on the case being brought under their review, in consideration of the doubt as to the royal prerogative in Scotland, expressed in the House of Lords, appointed intimation to be made to the Officers of State, and allowed them to appear for his Majesty's interest; and thereafter (12th May, 1826) adhered, except as to

the Book of Common Prayer, as to which they altered the Lord Ordinary's interlocutor, and removed the interdict in *hoc statu*.\*

Buchan and others appealed, and the King's Printers presented a cross appeal, in regard to the Book of Common Prayer.

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For the Appellants (in chief).—  
*Dr. Lushington* and *Mr. Keay*.

For the Respondents.—  
*Mr. Sugden* and *Mr. Bell*.

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#### Authorities for the Appellants.

Rob. App. Ca. 197; St. 1551, c. 27; 1606, c. 1; 1669, c. 1; 1689, c. 3; 1690, c. 1, 5, and 23; 1700, c. 2; 1702, c. 3; 1703, c. 2; 1707, c. 6; King's Printer, May 22, 1790, (8316); March 7, 1823, (2 Shaw and Dunlop, No. 254); Mackenzie's Obs. 153; 4 Bank, 22, 14; 1 Ersk. 5, 6; *Miller v. Taylor*, 4 Burrow, 2381, 2417; 5 Bac. Abr. 599; 1 Burn, Eccl. Law, 347, 373, 4to. edit.; *Basket v. Univ. of Cambridge*, 1 Blac. Rep. 114; *Stationers' Co. v. Carnan*, 2 Blac. 1004.

#### Authorities for the Respondents.

1 Mackenzie's Works, vol. i. p. 257; Anderson, Jan. 5, 1683, (Fountainhall); Rob. App. Ca. 197; *King's Printer v. Bell* and *Bradute*, May 22, 1790, (8316); 1 Burn, 348, 4to. edit.; 4 Burrow, 2381; Hinton, July 27, 1773, (8307); Becket, Feb. 22, 1774; 5 Bacon, 599; 1663, c. 27; 1701, c. 7; 14 Rymer, 650, 766; 2 Blackstone, Comm. 410.

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\* 4 Shaw and Dunlop, No. 368.



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*The Lord Chancellor.—*

The principal Respondents in this case are the King's printers in Scotland. They hold that office under a patent from the Crown. The Appellants are members of certain Bible Societies in Scotland, and have been in the habit of importing Bibles from England; and the material question to be decided in this case, is whether or not the King's printers in Scotland have, by virtue of their office and their patent, a right to exclude persons from importing Bibles, and theother works which are contained in the patent, from England?

Two important questions were raised in this case. One, which was raised, and which was argued at great length in the Court below, and argued very ably at your Lordships' bar, was as to the right of the Crown to grant a patent, the effect of which shall be, to prevent persons in Scotland from importing Bibles, and other works of the description mentioned in the patent, certain religious works, from England; and the second question turned upon the particular construction of the terms of this patent.

With respect to the first question, it arose out of the case of *Manners and Miller v. Blair*, which was before your Lordships' House two or three sessions ago. When that case came on for argument, and was argued at your Lordships' bar, it occurred to the learned Lord who then presided here, (Lord Gifford) that there was a doubt as to the validity of the patent, and as to the power of the King to grant a patent of that description. I do not mean to suggest that the

noble and learned Lord expressed any opinion upon that subject, but that he was desirous, before he decided that question, that that point should be argued at your Lordships' bar; but which was in fact, never argued in the particular case, because the case in which I am about to propose that your Lordships should give judgment, was before the Courts below; and being before the Courts below, the point was raised before the judges of the Court in Scotland, which had not in fact been raised in the case of *Manners* and *Miller v. Blair*; and that case having come before your Lordships upon appeal, it was considered more convenient and proper, that the argument, with respect to the validity of the patent, and with respect to the prerogative of the Crown, should be on that particular case, than on the case of *Manners* and *Miller*; but your Lordships' decision in the one case, will be of course governed by the decision in the other.

In conducting the argument, with respect to the prerogative of the Crown, reference was made, and very properly made, to the cases of prerogative in England. For two hundred years and more, the kings have, in England, granted patents to their printers here, as extensive as the patent we are now considering, and perhaps more extensive, but extensive enough to raise the question we are now considering. In England, the power of the king to grant patents of this description, or to appoint to such an office, has never been seriously questioned. Those patents have from time to time come under the review of our Courts, and the judges have been called upon

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to decide upon them. One case occurred before Sir Joseph Jekyll, so far back as the year 1720, and others at different periods, both in the Courts of Equity, and also before this House during the last century; and I would state it as a point not admitting now of doubt or controversy, that as far as relates to the office of King's printer in England, the Crown has the prerogative to grant a patent as extensive as that we are now considering,—assuming, for the purpose of argument, that the patent is as extensive as it is contended on the part of the Respondents to be.

But although the power of the King and his prerogative in England has never been questioned, it has been rested by judges on different principles. Some judges have been of opinion, that it is to be founded on the circumstance of the translation of the Bible, having been actually paid for by King James, and its having become the property of the Crown, and therefore it has been referred to a species of copyright. Other judges have referred it to the circumstance of the King of England being the supreme head of the church of England, and that he is vested with the prerogative with reference to that character. Other judges have been of opinion, and I confess, for my own part, I am disposed to accede to that opinion, that it is to be referred to another consideration, namely, to the character of the duty imposed upon the chief executive officer of the Government, to superintend the publication, of

\* *Baskett v. Parsons*. At the Rolls 1718. In D. P. 1719. Cited in *Univ. of Oxf. and Cam. v. Richardson*, 6 Ves. 699.

the Acts of the Legislature, and Acts of State of that description, and also of those works, upon which the established doctrines of our religion are founded,—that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative. That was the opinion of Lord Camden, as expressed in the case of *Donaldson v. Becket*,\* in most direct and eloquent terms in this House: that was the opinion also expressed by Chief Baron Skinner, in the case of *Eyre and Strahan v. Carnan*;† and I think that may be collected or inferred to be the opinion of a learned and noble Earl, now a member of your Lordships' House, from what fell from that noble and learned Lord, in the case of *the Universities of Oxford and Cambridge v. Richardson*.‡

If that be so, if that is the true principle upon which this prerogative is to be rested, it appears to me that all difficulty ceases with respect to the prerogative in Scotland. In Scotland, as well as England, patents of this description have been granted without dispute or contest, for more than two hundred years. These patents have at different periods been made the subject of suits in the Courts of Scotland, and particularly in the case of *Watson v. Baskett*, in the year 1716, or the year 1717, which cases came afterwards by appeal to the House of Lords. In another case, that of the *King's Printers v. Bell and Bradfute*, this patent came under the consideration of the Courts of Justice in Scotland; and many other cases may be referred to, for the purpose of establishing the same fact: so that we have in Scotland, as

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\* 4 Burr. 2408. † Court of Excheq. 1781. ‡ 6 Ves. 704, 5.

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well as England, patents granted successively for a period of more than two hundred years. These patents have been the subjects of suits. These cases have come to your Lordships' House; and I do not think, that until the doubt was thrown out by the noble and learned Lord to whom I have referred, the late Lord Gifford, the prerogative of the Crown of Scotland was ever called in question. Certainly it never did occur to the very able counsel who argued the case of *Manners* and *Miller v. Blair* in the Court below, seriously to consider or to contest that point.

In the course of this argument it was assumed, as the basis of a part of an argument, that the prerogative in England depended upon the King's character as supreme head of the church; and it was argued, that that principle did not apply to Scotland, for that although the King was the supreme head of the church in England, he was not the supreme head of the church in Scotland; and therefore the prerogative might well exist in this part of the island, and yet not exist in Scotland. But, I have already stated, that I do not refer the prerogative to the circumstance of the King being, in a spiritual or ecclesiastical sense, the supreme head of the church in England, but to the kingly character—to his being at the head of the church and state, and it being his duty to act as guardian and protector of both,—a character which he has equally in Scotland and England. It is perfectly clear, that it is the duty of the King to act this part, as the guardian of the church in Scotland. That is a principle laid down by the authorities in Scotland as much as in England. By the authority of the statute

by which the Reformation was established in Scotland, it is declared to be the duty of the magistrates, and the King as supreme magistrate, to be the protector of the church; and in the Act of 1690, by which the Presbyterian church was established, when the Episcopalian church authority was finally put an end to in Scotland, the same principle is laid down and acknowledged. I think, therefore, that this right and prerogative depends upon the King's character as guardian of the church and guardian of the state, to take care that works of this description are published in a correct and authentic form; and that those arguments upon which the authority rests in this country apply also in Scotland.

But it was said at the bar, that in England, as far as relates to the translation of the Holy Bible, we have the translation recognized by public authority, introduced into the service of the church by public authority; and that the prerogative in England will properly apply to this translation, but that the same principle does not apply in Scotland.

With respect to the Bible which was translated in the reign of James the First, and which indisputably was translated under his sanction, and by virtue of his authority, it does not appear that he contributed any thing towards the expense. It does not appear that that translation of the Bible was introduced into the church by the authority of any Act of Parliament, by the authority of any Act of Convocation, or by proclamation; but undoubtedly it was introduced under the sanction and authority of the head of the church, under the sanction of the King of that

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period,—in what precise way does not appear by evidence. It is probable, that after it was completed, and the heads of the church were satisfied with it, it was by the authority of the bishops, in their respective dioceses, introduced into general use throughout the kingdom, possibly without any further act for that purpose. But is there any essential difference between the situation of England and Scotland in this respect? I apprehend clearly none; because the same translation has, if not by the actual authority, at least by the sanction of the General Assembly of Scotland, been introduced into their church, and used there for a period I believe of one hundred and fifty years; and I understand that use of it in Scotland is as general, and indeed as exclusive and universal as in England. This translation, therefore, has been sanctioned in the country by the church of that country, and by the proper ecclesiastical authorities; and I apprehend that it stands in the same situation, and is guarded by the same privileges, and is in point of law, unless the General Assembly should order otherwise, as compellable to be used in the churches of Scotland as it is in the churches of England. I do not apprehend, therefore, that there is any difficulty in this respect, or that any argument whatever, can be founded on the idea, that by some authority in this country that particular translation has been introduced into universal use in our church, and that no corresponding authority exists in Scotland. I have no doubt there is some authority, at least some implied authority, for the introduction of it in England; and I apprehend there is

the same implied authority, the same sanction for it by ecclesiastical authorities in Scotland.

It was in consequence of this circumstance, and some doubts arising out of this particular view of the case, that the noble and learned Lord to whom I have referred, was desirous that in this particular view, it should be considered again.

It appears to me, that as far as relates to the translation of the Holy Scriptures, the case with respect to Scotland is precisely the same as it is with respect to England. But in this patent there are other works noticed. There is the Confession of Faith. I find that the Confession of Faith was ratified by the General Assembly, in the year 1649; it is therefore a book adopted by the proper ecclesiastical authority in the country. The larger and the shorter Catechisms were also ratified by the General Assembly about that same period: and with respect to the metrical version of the Psalms, which is also contained in that patent, that was, as I am informed, prepared by the authority of the General Assembly, and it is used in the churches by authority of that General Assembly. It appears to me, therefore, that these works come within the same principle as the Holy Scriptures, and within the same principle as the Book of Common Prayer in this country.

A question has been raised with respect to the Book of Common Prayer, which is also contained in this patent; and it is said, that at all events, the King could not in Scotland, confer the exclusive right of printing this work on his printer in Scotland. The Court below entertained some

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doubt upon this point, and in this particular stage of the cause, they have excepted the Common Prayer from the operation of their interdict, without, however, pronouncing any decision upon it. At one period episcopacy existed in Scotland. During that time, there is no doubt the King's authority applied to the Book of Common Prayer, as well as to the other works to which I have referred. It is true, that by the Act of Parliament passed in the year 1690, an alteration was made in this respect. By the effect of that Act of Parliament in 1690, the presbyterian form of worship became the established form in Scotland, and the church of that persuasion became the established church of Scotland: but, those persons who were members of the church of England, who were in her communion, were still entitled to the protection of the Crown; there was nothing in that Act of Parliament to deprive them of that protection; and if the King possessed the prerogative previous to the passing of the Act in 1690, by which he had the exclusive right, by himself or his officers, in Scotland, to publish the Book of Common Prayer, there is nothing in the Act of 1690, to deprive him of that prerogative, which he had previously enjoyed.

It does not appear to me, therefore, in this view of the case, that there is any essential difference between that part of the patent which relates to the Book of Common Prayer, and that which relates to the other works. I think, therefore, that with respect to this question, which was not originally mooted in the Court below,

namely, the general question of the validity of the patent, which was only afterwards argued in the second case, in consequence of the wish intimated by the noble and learned Lord to whom I have adverted, that your Lordships will have no difficulty in coming to the opinion, that in Scotland, as in England, the King possesses this prerogative, and that he has a right to confer it upon his printer.

If that be so, the only remaining question to which I propose to call your attention is, the construction of the patent.

I confess I had considerable doubts at first, in determining what was the proper construction of this patent; but in looking very attentively at the patent, considering the whole bearing of it, and all the facts of the case, those doubts and difficulties have ceased. The patent is in substance this, that those particular individuals are declared to have the sole and exclusive right of printing in Scotland, the particular works which are mentioned in it. They are to have the office, and discharge the duties, with all its perquisites, all its emoluments, and all its privileges, as far as it is consistent with the articles of Union, That is the granting part of the patent, to which I shall at present confine my observations.

The expression, "as far as it is consistent with the articles of Union," requires some explanation. A short time before the patent was granted to Baskett in the year 1716, which was in the same terms as this, a patent had been granted to a person of the name of Freebairn, in the year 1711. That patent was, in the granting part of it, as general as this which I have stated; but

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it contained a prohibition against all persons importing, either from England, or any parts beyond the seas, any of the particular works enumerated in the patent. Some doubts were created in the minds of some persons, with respect to the validity of that patent; it was submitted for the consideration of the Lord Advocate of Scotland, Sir James Stewart; and Sir James Stewart was of opinion, that it was contrary to the fourth article of the Union between England and Scotland, to prohibit the importation of those works from England. The patent was also referred to the consideration and opinion of Mr. Kennedy, who held at that time, the office of Solicitor-General of Scotland: he gave an opinion upon this point, directly the reverse of that expressed by the Lord Advocate; and it turns out in the result, as appears by the decision in the case of *Richardson v. the Universities of Oxford and Cambridge*, that the opinion which the Solicitor-General gave was the correct opinion, and that the patent was not contrary to the terms of the article of Union. If that be so, then we may read this patent precisely as if those words were not contained in the patent; and then it is a question, as to the exclusive right of printing these particular works, granted with the office of King's printer, with all the privileges, and with all the emoluments incident to that office. With reference to the previous part of it, the exclusive right of printing works of this description, must carry with it the right of excluding all other persons from the participation, from the right of printing them or circulating them. The one is a consequence of the other. If the Crown

by its prerogative, has a right of printing by its officer, it has by its prerogative, the right to exclude all others from the enjoyment of the right, by importation or otherwise. Therefore, when the King grants the right of printing, he grants the other part, namely, the authority he possesses, or rather, as Lord Eldon has said, the duty consequent upon that authority, the duty of excluding others; and it appears to me, therefore, on looking at the subject in this view, with reference to the granting part of the patent, the patentees have clearly a right to exclude.

But there is a prohibition which follows the granting part of the patent, and it is said, the prohibition extends only to parts beyond the seas; and there is a penalty annexed to the prohibition,—all persons are prohibited from importing the specified works from parts beyond the seas, under the penalty of losing those works. But it is no objection to a patent, which conveys a particular power and a particular authority, that there is a prohibition accompanied with a penalty, and that that prohibition accompanied with a penalty, is not co-extensive with what is supposed to be the grant. An argument may arise out of the prohibition, for the purpose of construing the grant, and for the purpose of ascertaining what the intention of the granter was; but if the intention of the granter be clear, it does not follow that the grant is at all limited, from the circumstance of there being a prohibition, accompanied with a penalty, which is not co-extensive with the grant.

But in this case no question can arise upon the limitation of the prohibition, because we can un-

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derstand at once, what was the reason of the limited nature of the prohibition. That prohibition arose out of the doubt expressed in the opinion of the Lord Advocate of Scotland. In the granting part of the patent, reference was made to the articles of Union. We grant you all the powers which have been enjoyed by any of your predecessors in this office, as far as they are consistent with the articles of the Union, but no further. It was supposed that the prohibition of importation from England, was contrary to the fourth article of the Union; and therefore, when the party drawing that patent came to the prohibition to be followed by a penalty, he did not choose to carry that prohibition beyond the point, to which it could be with safety and certainty extended. When we find that it has been decided, that the articles of the Union do not bear upon this case, we have at once an interpretation of the whole patent, and see the reason for the limited prohibition, and that these words were not intended to have any effect in limiting the patent, unless the articles of the Union required it should be limited. My opinion is, that it is a grant of the authority of the Crown; that the Crown intended to convey all the authority it possessed, and, as Lord Eldon very properly says, there is a duty incident to the authority. The Crown intended to convey its authority, and the Crown intended to convey that authority with a corresponding duty. I therefore cannot bring myself to entertain any serious doubt with respect to the construction of the patent.

On these grounds, I should recommend to the House, both with respect to the former objection,

—as to the prerogative of the Crown, and also with respect to the construction of the patent, —to confirm the opinion expressed after very elaborate argument, and expressed in great detail, and with great ability, by the judges below. I should propose, that in the case of *Buchan v. Blair*, the interlocutors complained of by the original appeal should be affirmed, and those complained of by the cross appeal reversed; and as incident to that decision, I should propose that the judgment in the case of *Manners and Miller v. Blair*, should also be affirmed.

The only difference to which it is material to call your attention, is that in the case of *Manners and Miller v. Blair*, the interlocutor includes the Book of Common Prayer: but in consequence of some doubts entertained by the learned judges, having been expressed in the interlocutor in this particular case of *Buchan v. Blair*, that is made the subject of exception: I should recommend to your Lordships, that these interlocutors be affirmed on all other points; and as to this exception, that the interlocutor be reversed.

The effect of the judgment will be, that the King's printer in Scotland will stand on the same footing as the King's printer in England. It has been decided, that the King's printer in England has a right to prevent the importation of all books which come from Scotland. I did not mention that as the foundation of the judgment,—that was not a ground on which to proceed to such an adjudication; but, at the same time, your Lordships will not regret that the judgment to be pronounced is followed with consequences so just and equitable.

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## SCOTLAND.

(COURT OF SESSION.)

SIR NEIL MENZIES, BART. - - - *Appellant.*

The EARL OF BREADALBANE and }  
 another - - - - - } *Respondents.*

A proprietor of land on the bank of a river, having commenced the building of a mound, which according to the opinion and report of an engineer, would, if completed, in times of ordinary flood, throw the waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them, was restrained by perpetual interdict, from the farther erection of any bulwark, or other work, which might have the effect of diverting the stream of the river in time of flood from its accustomed course, and throwing the same upon the lands of the Appellant.

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IN 1798, the predecessor of the Appellant, by bill of suspension and interdict, complained against the proprietor of the lands held by the Respondent, that he had begun to erect upon the upper end of a piece of land, along the bank of the river Tay, at the distance of four or five yards from the ordinary channel, a bulwark, which, if finished, would have the effect of turning the water upon the complainer's property, and overflowing his lands.

An interdict was granted upon this bill, and a remit was made to an engineer to inspect the channels of the river, and report on the probable effect of the erection of the bulwark.

No further proceedings were taken until 1821, when the Respondent having purchased the property called Bolfrax, on which the bulwark was erected, wakened and transferred the action against the Appellant, who was the representative of the original complainer; whereupon the matter was referred to an engineer, upon the terms of the original remit.

The engineer by his report, gave a description of the lands in question; of the channels, and the effect of floods in the river; and of the ordinary modes and effect, and the proper site and construction of embankments; and concluded by reporting, that the embankment on the upper end of Bolfrax-haugh was too near the margin of the ordinary channel of the river.

Upon the report, the Lord Ordinary declared the interdict perpetual.

On the 4th July, 1826, the interdict was recalled by the Court.

The appeal was against this decision.

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For the Appellant.—*Mr. Moncrieff.*

For the Respondent.—*The Solicitor General* and *Mr. Keay.*

Authorities for the Appellants.—*Ersk.* 2, 1, 5, and 2, 9, 13; *Dict. voce Property*; *L. Glenlee*, March 10, 1804, (12,834); *Hamilton*, March 5, 1793, (12,824); *Dick. Nov.* 16, 1769, (12,813); *Town of Aberdeen*, Nov. 22, 1748, (12,787); *Fairlie*, Jan. 26, 1744, (12,780); 39 *Dig. t.* 3, l. 1, § 2; 39 *Voet*, 3, 4.

Authorities for the Respondent.—*Farquharson*, June 25, 1741, (12,779,) and *App. Voce. Prop.* No. 5.

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*The Lord Chancellor.*—This is a question arising out of an embankment on the river Tay. The river Tay, on the north side, at the spot in question, is bounded by a considerable extent of flat land, belonging to Sir Neil Menzies; on the southern side it is chiefly bounded by high land, but this high land terminates at a point called Bolfrax-haugh, which land belongs to Lord Breadalbane. Bolfrax-haugh continues for the space of about twenty-seven acres. Then there is another piece of land, Farleyer Island, part of which belongs to Lord Breadalbane, and between those two lands there is a portion of the old channel, as if the water had formerly ran in that direction. There are some facts not at all in dispute in this case. Every person knows the character of the river Tay; and that in times of flood, that is, in autumn, winter, and in the spring, the flood stream takes its course with very considerable violence along this piece of land, to which I have referred. It is therefore obvious, that an embankment running parallel to the stream, commencing at the first point of Bolfrax-haugh, and carried up to Farleyer Island, would have the effect of stopping up the old course of the flood stream, and throwing it entirely on the opposite piece of land belonging to Sir Neil Menzies, and the question in this case is, whether the proprietor of this land, Bolfrax-haugh, has a right so to do?

The land which now belongs to Lord Breadalbane, was formerly the property of Mr. Alexander Menzies, and in the year 1778 he commenced these works, when he either formed or repaired a jetty in the alveus of the stream, and he connected

with that jetty the embankment in question, which embankment is one or two yards distant from the course of the stream, about three feet in height, sufficiently high to turn the flood water of the river. Those works were carried on, I think, to the extent of about two hundred yards. In consequence, Sir John Menzies then the proprietor, filed a bill of suspension and interdict; an interim interdict was obtained, and further proceedings were carried on; but these further proceedings were all at once suspended, until the year 1821.

In the mean time Lord Breadalbane purchased the property of Mr. Menzies; and having purchased the property, he revived those proceedings. When the case came before the Lord Ordinary, as far as related to the jetty, and any other works in the alveus of the stream, he was of opinion that the interdict should be continued; but he referred the question, as to the embankment upon the side of the river, on the property of Lord Breadalbane, for further debate and consideration. It ultimately came before the First Division of the Court of Session, and the interdict, as far as related to the embankment, was dissolved.

While this affair was going on before the Lord Ordinary, an engineer of considerable eminence, Mr. Jardine, was, according to the course of proceedings in the Court of Session, directed, as the servant and officer of the Court, and standing between the parties, to view the place, and report his opinion. Without going into the minute particulars of that report, I may state, that it is clear that if this embankment should be continued, as it is projected, along the banks of the river, it

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will have the effect of throwing the ordinary flood streams of the river off the lands of Lord Breadalbane, and on the lands of Sir Neil Menzies. Many circumstances were referred to at the bar, with respect to the law of England upon this subject. It is quite unnecessary to trouble your Lordships with any observation on the law of England, and particularly on the law of England with reference to particular places, because it is clear, beyond the possibility of a doubt, that by the law of England, such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course, by a sort of new water-way, to the prejudice of the proprietor on the other side; and I am the less disposed to trouble you with reference to the law of England, for that can be referred to only by way of illustration. This case must be decided by the law of Scotland.

Now, with reference to the law of Scotland, this is perfectly clear, that a superior heritor cannot divert any part of a stream to the prejudice of an inferior heritor. It is also clear, that an inferior heritor cannot do that which shall cause the water to stagnate, to the prejudice of the superior; that is acknowledged to be clear law. But it is said, that applies only to the alveus of the course. But it does not appear to me, that there is any solid ground for the distinction. The ordinary course of the river, is that which it takes at ordinary times; there is also a flood channel: I am not talking of that which it takes in extraordinary or accidental floods, but the ordinary course of the river in the different seasons of the

year, must, I apprehend, be subject to the same principle.

But let us see what is said on this subject by the institutional writers on the law of Scotland. Erskine, in his Institutes, is distinct, as it appears to me, and precise upon the subject. He says :—  
 “ When a river threatens an alteration of the  
 “ present channel, by which damage may arise to  
 “ the proprietor of the adjacent or opposite  
 “ ground, it is lawful for him to build a bulwark  
 “ *ripæ muniendæ causa*, to prevent the loss of  
 “ ground that is threatened by that encroach-  
 “ ment ;” so that the proprietor whose lands are  
 threatened to be washed away, may, for the purpose of protecting his own property in a case of that description, raise a bank for his own security ; but this bulwark must be so executed, as to prejudice neither the navigation, nor the grounds on the opposite side of the river ; and as a guard against these consequences, the builder, before he began his work, was obliged by the Roman law to give security. Nothing, therefore, can be more distinct and precise, than the language of Erskine in his Institutes, with respect to this particular case. He says :—“ You  
 “ may protect your own property from destruc-  
 “ tion ;” so you may by the law of England : but he says in distinct terms, “ Though the river  
 “ threatens to change its channel, and to encroach  
 “ upon your land, you cannot protect yourself  
 “ to the prejudice of the opposite proprietor.” Lord Stair in his Institutes, though not so clear and precise, yet in general terms confirms that which is laid down by Erskine in his Institutes.

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The language of the Roman law, according to the passage cited in the case, confirms the same doctrine. It is there said, (39 Dig. t. 3, l. 1,) "*Opus quod quis fecit ut aquam excluderet, quæ exundante palude in agrum ejus refruere solet, si ea palus aqua pluvia ampliatur, eaque aqua repulsa eo opere agris vicini noceat, aquæ pluviae actione cogetur tollere;*" and, according to a passage quoted in the printed papers, Voet repeats the same doctrine. In the Digest you will find another passage to the same effect, under the title "*De Aqua,*" (lib. 39, tit. iii.) "*Hæc autem actio locum habet in damno nondum facto, opere tamen jam facto; hoc est de eo opere, ex quo damnum timetur, totiensque locum habet, quotiens manufacto opere agro aqua nocitura est; id est cum quis manu fecerit quolibet flueret, quam natura soleret; si forte immittendo eam aut majorem fecerit aut citatiorem aut vehementiorem,; aut si comprimendo redundare effecit: quod si natura aqua noceret, ea actione non continentur.*" It appears to me, that that passage (and there are others to the same effect in the Digest) confirms the opinion laid down by Erskine in his Institutes, with respect to the law of Scotland, in confirmation of which, he refers to the Roman law. It is true that passages may be found in the Digest, appearing to have a contrary tendency, but I think they may be all reconciled: or, consider the subject in this light, that these passages to which I am now alluding, have reference to accidental and extraordinary casualties, from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours,

for the sake of self-preservation, guard themselves against the consequence ;—perhaps in this way, the different passages in the Digest may be reconciled.

The principal authority, as it was conceived in the Court below, and as it was at your Lordships' bar, was a case decided in the year 1741,—the case of *Farquharson v. Farquharson*.\* It was considered that that was a case directly in point ; and if that had been a decision directly in point, I confess I should have had very great hesitation in declaring the opinion I am now doing. But I have read through that case, and attended to the different reports of it with the greatest attention, and I think that it is distinguishable in almost every particular, from the case now before your Lordships. That was the case of the land of two proprietors on the river Cluny, on opposite banks of the river, which runs northward, and falls into the river Dee. Auchindyne grounds were on the left bank ; Invercauld's grounds on the right. Invercauld on his grounds had erected a mound ; and the question was as between him and Auchindyne, whether he was entitled to erect that mound ; and it was decided that he was. But the circumstances were of this description :—The river had been continually going to the eastward. It had in one instance, actually departed from its original course, and taken a new direction, placing a part of Invercauld grounds on Auchindyne side, and was obviously repeating, or attempting to repeat, the same operation, by a new encroachment on

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\* The papers were reprinted, and laid before the House.

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Auchindyne grounds. The mound erected, therefore, was not to have the effect of altering the old course of the river, but it was to have the effect of preventing the old course of the river from being altered; and that, I apprehend, is a most material distinction in cases of this kind. But, independently of this, there was evidence to shew, that at least a considerable part of the bank was built on old foundations. There was further evidence of this description, which, with respect to cases like the present, is of the most important character, that, according to the custom of that part of the country, proprietors on the opposite sides of the rivers had embanked against each other; and in this particular case it was proved, that Auchindyne had himself embanked on his side of the river, for the purpose of preventing the overflow of the water on his side, so as to throw it on Invercauld; it was proved also, as the last circumstance, that the destruction of the grounds of Invercauld would have followed, if these works had not been allowed, and that the most trifling damage in point of amount, was occasioned to the proprietor on the other side.

It was under these circumstances, with all these facts appearing, that the Court gave their opinion in favor of Invercauld. That case is distinguishable in all its particulars from the present. That was a dam erected to prevent a change in the course of the water, and it was sanctioned also by the custom in that part of the country, and sanctioned also by the practice which had prevailed as between those different and opposite proprietors.

Under the circumstances of this case, Lord Breadalbane ought not to be allowed to carry on this work to the prejudice of Sir Neil Menzies, and the judgment of the Court below cannot be sustained. The interdict is in terms too extensive, because it prevents new *opus manufactum* on the banks of the river without qualification. It will be necessary in the form of judgment, that that should be in some way qualified. I shall, therefore, prepare a judgment, and submit it to your Lordships' consideration.

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It is ordered and adjudged, "that the Respondent ought  
 " to be prohibited and interdicted from the further erection of  
 " any bulwark, or any other *opus manufactum*, upon the banks  
 " of the river Tay, which may have the effect of diverting the  
 " stream of the river in times of flood, from its accustomed  
 " course, and throwing the same upon the lands of the Appel-  
 " lant; and that with this declaration, the cause be remitted  
 " back to the Court of Session, to vary the interlocutors com-  
 " plained of, in such manner as may be consistent with the  
 " above declaration, and to do further in the cause as may be  
 " just, and in conformity therewith."

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## SCOTLAND.

(COURT OF SESSION.)

JOHN CRICHTON - - - - - *Appellant.*ELIZABETH GRIERSON and others - *Respondents.*

J. C. by a deed of trust and settlement, gave all his lands, &c. to trustees, among whom was his brother, who accepted the trust, for the payment of debts, legacies, and other purposes, among which were donations to certain specified charities. The deed then contained this passage, "And in regard, I have not yet determined in what way and manner the further distribution of my means and estate shall take place. I hereby reserve to myself power and liberty to make such distribution at any time preceding my death, either in holograph instructions to my said trustees, to be executed informally, or by a formal deed, &c." In a codicil to this testamentary instrument, he made this declaration:—"In the event of my failing to make a distribution of my means and estate, which shall remain after fulfilling the purposes before specified, either by holograph instructions, though not formally executed, or by a formal deed of instructions, which I reserve to myself full power to do, then it is my wish, that such remaining means and estate, shall be applied in such charitable purposes, and in bequests to such of my friends and relations as may be pointed out by my said dearly beloved wife, with the approbation of a majority of my said trustees; and in the event of her decease, or entering into a second marriage, before such application shall have been pointed out and approved of as aforesaid, then I hereby empower the majority of the said remaining trustees, to make the application in the way and manner they would conceive to be most agreeable to my wishes if in life."

In a question between the brother claiming as next of kin, and the trustees—Held, 1. That the acceptance of the trust was not such an homologation of the deed, as to bar his title to sue. 2. That the testamentary instruments contained a valid disposition of the residue.

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**JAMES** Crichton, who had acquired a fortune in India, and returned to Scotland in 1806, made in 1821, a disposition and settlement in favor of his wife, so long as she should remain a widow, and of four other trustees, (among whom was the Appellant his brother,) or a majority of them who should accept, or act, &c. in trust, for the uses, ends, and purposes, thereafter specified, and contained in any instructions expressive of his will, to be executed by him as aftermentioned : By this disposition he gave all and sundry lands, &c. and appointed the trustees who should act, sole executors, and universal legatees, and intromitters, in trust, with his whole personal estate. Various trusts were then declared by the deed, for payment of debts, legacies, &c. He also directed his trustees to make payment of 200*l.* sterling, to each of three charities, viz. the Infirmary of Dumfries and Edinburgh, and the Lunatic Asylum of Edinburgh. The deed then proceeded in these terms:—"And in regard I have not yet determined in what way and manner the farther distribution of my means and estate shall take place, I hereby reserve to myself power and liberty, to make such distribution at any time preceding my death, either in holograph instructions to my said trustees, to be executed informally without the usual solemnities, or by a formal deed of instructions relative hereto."

On the 20th of November, 1821, he executed a codicil in these terms:—"I hereby declare, that in the event of my failing to make a distribution of my means and estate which shall remain, after fulfilling the purposes before spe-

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“ cified, either by holograph instructions, though  
 “ not formally executed, or by a formal deed of  
 “ instructions which I reserve to myself full  
 “ power to do, then it is my wish that such  
 “ remaining means and estate shall be applied to  
 “ such charitable purposes, and in bequests to  
 “ such of my friends and relations, as may be  
 “ pointed out by my said dearly beloved wife,  
 “ with the approbation of a majority of my said  
 “ trustees; and in the event of her decease, or  
 “ entering into a second marriage, before such  
 “ application shall have been pointed out and  
 “ approved of as aforesaid, then I hereby em-  
 “ power the majority of my said remaining trus-  
 “ tees, to make the application in the way and  
 “ manner they would conceive to be most agreea-  
 “ ble to my wishes if in life.”

James Crichton died in 1823, without having executed any instrument of instructions, or made any other disposition of the residue of his personal estate. The Appellant with the other trustees, accepted the trust by a minute in writing, and undertook to execute the trusts. But afterwards he raised an action of declarator in the Court of Session, insisting that James Crichton had not disposed of the residue of his estate, after answering the special purposes expressed in the deed of trust; that the codicils did not contain any such certain and definite appointment as to be legally effectual, for the disposal of the residue; and that therefore, the residue belonged to him and his sister as next of kin of James Crichton, concluding accordingly for a declaration to that effect; and that the trustees should be

ordained to reckon with him, and pay the share of the residue.

The trustees by their answer, contended, 1. That the Appellant had homologated the deed, by acting under it as trustee, and claiming under it. 2. That the expressions of the codicil amounted to a definite exposition of the legal will of the deceased.

On the 12th of May, 1826, the Court sustained the defences, having before repelled the objection to the title of the Appellant to sue.

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For the Appellant.—*Mr. Sugden\** and *Sir J. Moncrieff*.


For the Respondents.—*Mr. Brougham* and *Mr. Fullerton*.

Authorities for the Appellant.—Dig. lib. 11, § 7, de leg. 3, et seq. ; Voet 28, 5, 29, ; Pothier de Test. 8, § 1 and 2 ; Voet 30, 1, 36 ; Domat 2, 3, 1, § 1 ; 3 Ersk. 9, 6, and 8 ; Balfour, tit. Exec. p. 220 ; Dirleton, p. 73 ; Stewart, p. 74 ; Ersk. 3, 9, 8, and 3, 1, 42 ; Stair 1, 13, 7 ; 2 Swinburn, p. 463 ; 2 Vin. tit. 20, de Legatis ; 2 Craig, 3, 14 ; Com. of Berwickshire, June 18, 1678, (1351) ; *Trades of Edinburgh v. Heriot's Hospital*, Aug. 9, 1765, (5750) ; Christie, July 6, 1774, (5755) ; Campbell and M'Intyre, June 12, 1824, (3 Shaw and Dunlop, No. 93) ; Kames' El. p. 213 ; Ersk. 3, 9, 14 ; Campbell, June 26, 1752, (7440) ; Dalzell, March 11, 1756, (16,204) ; Hepburn,

\* Mr. Sugden opened the case ; but Sir James Moncrieff as Dean of Faculty, protested as having a right to precedence over King's counsel. This claim of right was resisted by Mr. Sugden ; and the Lord Chancellor said, the course now followed, would not be considered as a precedent, as the counsel had preserved their rights by protest.

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Feb. 13, 1699, (7428); Buchanan, July 23, 1629, (671); Hamilton, Feb. 23, 1681, (672); Sholee, Jan. 1684, (672); Corsan, Feb. 19, 1734, (673); Campbell, Nov. 22, 1739, (674); Earl of Rothes, Jan. 21, 1823, (2 Shaw and Dunlop, No. 130); 3 Bankton. 8, 45; Sanders on Uses, (3d edit.) vol. i. p. 253; *Ommaney v. Butcher*, 1 Turner's Rep. p. 260; *Wynne v. Hawkins*, 1 Brown's C. C. 179; *Pierson v. Garnet*, 2 B. C. C. 38, and 225; *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 522; *Moggridge v. Thackwell*, 10 Ves. 538; *James v. Allen*, 3 Meriv. Rep. 17; *Mohun v. Mohun*, 1 Swanston's Rep. 201; *Vesey v. Jamson*, 1 Simon and Stuart, p. 69.

Authorities for the Respondents.—Dirleton, p. 73; Murray, Nov. 28, 1729, (4075). Campbell, Dec. 16, 1738, (4076 and Elchies' Dec. No. 14, Mut. Con.); Dick, Jan. 22, 1728, (7446); Brown, Aug. 3, 1762, (2318); Buchanan, Dec. 16, 1806, (No. 1, Ap. Service); Hill, Dec. 14, 1824, (3 Shaw and Dunlop, No. 283); affirmed, House of Lords, April 14, 1826, MSS. and 2 Wilson and Shaw, No. 11, p. 80.)

*The Lord Chancellor*, after having stated the material parts of the will, and observing that the question turned entirely on the construction and validity of the clause in the codicil, providing for the event of failure to make a distribution of the residue, as before set forth, proceeded thus :—

The first point to which I call your attention is, the last part of the clause, for the purpose of getting rid of the argument that was urged at the bar. It was contended, that whatever the construction might be of the former part of the


clause, the latter gave an absolute power and control to the trustees, to dispose of the property, without regard to any limitation or condition whatever, except that they were to do it generally in the manner they might conceive most agreeable to the disponent's wishes, if in life; but I apprehend, when the clause comes to be attentively considered, it does not bear that construction. He gives a power to the wife, with the approbation of a majority of the trustees, to dispose of the residue for particular purposes and particular objects; and the word made use of in that part of the clause is, that it shall be applied for particular objects and particular purposes, as pointed out in that clause. The disponent then goes on to say, that in the event of his wife dying, or of her marrying again, (by which she was to be deprived of the power of acting under this clause) those trustees, or the majority of those trustees, were to make the application in the manner they should conceive most agreeable to the wishes of the disponent, if in life. I apprehend, that, in point of construction, this refers to the former clause; and when he talks of the application, it means that the trustees are to make such application, with regard to the objects before pointed out, in the manner the trustees should conceive to be most agreeable to the wishes of the disponent, if he had been then in life. I am quite satisfied that that is the true construction of the clause, from reference to the point to which I have adverted.

I mention that, for the purpose of getting rid of that part of the argument, and of coming to that which is the whole question between the parties; namely, whether it is competent,

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—for that is the question,—whether it is competent for the disponent, by a deed of this description, to point out particular classes of persons and objects which are intended to be the object of his favor, and then to leave it to an individual, or a body of individuals, after his death, to select out of those classes the particular individuals or the particular objects, to whom the bounty of the testator shall be applied. It is contended, that to give effect to the decision of the Court below, will be, to allow a person to delegate to another the power of making a will for him, which is said to be directly contrary to the civil law, and directly contrary to the law of Scotland, which, it is said, is founded on the civil law. But I apprehend, that that is not the right way of considering the question. I cautiously abstain from expressing any opinion upon that point, which was adverted to in the course of the argument, and is much dwelt upon in the papers, because I think the question does not at all turn upon that position; that it narrows itself to this,—whether a party may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power, after his death, of appropriating the property, or applying any part of his property, to any particular individuals among that class, whom that person may select and describe in his will.

The first case to which I shall refer, (because it is the earliest in point of date,) is the case of *Murray* against *Fleming*, which was decided, I think, so far back as the year 1729. It is in these terms:—“ A husband disposed his land estate to

“ his wife in life rent, and to any of his blood relations she should think most fit, to be nominated by a writ under her hand, in fee.” The Court of Session decided, “ that this disposition granted by the husband to his wife did sufficiently enable her to nominate persons to succeed to the subjects disposed ; and that she having accordingly exercised that power, the persons named by her have right to succeed.” That, certainly, upon the first impression, is a strong case for the purpose of establishing the position to which I am adverting ; but much ingenuity and much talent was exercised at the bar, as was done throughout every part of the case, by the learned counsel who appeared on the part of the Appellant, and, with reference to the particular authority to which I have referred, great pains were taken, by looking into the original papers and proceedings in the cause, and adverting to the arguments of counsel as detailed in those papers, to shew that the judgment of the Court was founded upon the consideration, that the wife had a constructive fee. Now, I do not mean to say that it is impossible, or even improbable, that that should have been the foundation upon which the Court proceeded ; but still I find that Lord Bankton (who is a very competent authority,) in a passage in his work, to which reference has been made in the course of the argument adverting to this case, and adopting its authority, does not put it upon that ground, or consider that the Court decided it upon that ground, but he represents it as decided simply on the ground of authority for the object in question being granted to the wife ; and my Lord Kames, following Lord Bankton, in his valuable

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work on the "Principles of Equity," considers the case as having proceeded upon the same ground.

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But the point of law does not rest upon the authority of this case alone. The next case in point of time was the case of Brown against his relations. The disposition was in these terms :—  
 " And the remainder of the proceeds of my said  
 " means and estate, after payment of the several  
 " legacies already bequeathed, or to be be-  
 " queathed by me at any time of my life in man-  
 " ner aforesaid, and of the payment of the ex-  
 " penses of executing this trust, to be divided  
 " amongst my poorest friends and relations whom  
 " I may have forgot herein, or in any other deed  
 " to be made by me in relation hereto, at any time  
 " during my life." So that it was to be divided  
 among his poorest friends and relations whom he  
 had forgotten in that deed, or whom he might  
 forget in any one of a similar description he might  
 afterwards make. Now, the judgment of the  
 Court was in these terms :—" The Lords find,  
 " that by the trust-disposition executed by the  
 " deceased John Brown, his trustees are vested  
 " with a discretionary power to divide amongst  
 " the poorest friends and relations of the said  
 " John Brown, the remainder of his estate, after  
 " payment of his debts and legacies, and the ex-  
 " penses of executing the trust, and that without  
 " distinction, whether the said relations are con-  
 " nected by the father's or by the mother's side,  
 " and also without distinction of degree : " so that  
 in that case it was considered, that a discretionary  
 power was, according to the terms of the dispo-  
 sition, vested in the trustees, to divide that portion

of the property among the relations of the disposer, both on the father's and the mother's side.

"A third case, to which I may also refer, for the purpose of establishing the same principle, is that of *Snodgrass* against *Buchanan*. The case was of this description; the dispositive clause was in these terms:—"Therefore, for love and other causes, I do hereby assign, dispo-  
" over from me, to and in favour of the said Cap-  
" tain Alexander Buchanan, and the heirs of his  
" body, or his assigns; whom failing, to such of  
" my mother's relations as my kind and respected  
" friend, Mrs. Margaret Buchanan, widow of  
" Dugald Buchanan, Esq. of Craigievarin, shall  
" appoint by a writing under her hand; which fail-  
" ing, &c." I consider that as another authority tending to establish the same position. The argument that was urged at the bar was, that in that case the question was not raised; but I consider that a strong circumstance tending to establish the position, for the cases to which I have referred had previously occurred. One was decided so far back as the year 1729, the other was decided at a subsequent period, both of them long anterior to the case to which I have referred; and when I advert a little to the manner in which the case to which I am now drawing your attention was contested by the activity and talent of counsel, the circumstance of the point not having been raised in that case, can be explained only from a thorough conviction of all professional gentlemen at the time practising in Scotland, that the point was too clear for argument; therefore, I consider that, though the question was not raised in that case, the circumstances connected

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with the case, tend strongly to confirm the position to which I have already called your attention.

Another case was that of a disposition made by a person of the name of Alexander Horn. The facts of the case I find stated in the speech on giving judgment delivered by the late Lord Gifford, in a case to which I shall presently direct your Lordships' attention. Alexander Horn disposed of his property, or a part of his property, to the Lord Provost and Magistrates of the city of Edinburgh, to be applied, according to their discretion, among the poor labourers of that city. That case was quoted for the purpose of establishing the position advanced by the late noble Lord to whom I have referred, in the case of *Hill* against *Burns*; and this case is another authority tending to the same point, because that property was disposed of in favour of a particular class of persons, out of whom a selection was to be made after the death of the disponent, by the particular individuals to whom that property was conveyed.

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The case to which I have referred, in which the case of Alexander Horn was cited, was a case of *Hill* against *Hood's Trustees*: that was a case in the first instance decided by the First Division of the Court of Session, and afterwards came before this House; and the material part, the disposition of the party, was in these terms:—She appointed the residue of her estate to be applied by her trustees and their foresaids, in aid of the institutions for charitable and benevolent purposes established, or to be established, in the city of Glasgow and its neighbourhood; and that in such way and manner, and in such proportions to the principal, the capital, or the interest or annual

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proceeds of the sums so to be appropriated, as to the trustees shall seem proper; declaring, as she thereby expressed, provided and declared, that they should be the sole judges of the appropriation of the residue for the purposes aforesaid. That case rested on the same principle, and was opposed on the grounds applied to the case now before you. Your Lordships were of opinion, upon the consideration of that case, that the decision of the judges in the Court below was correct and proper, and their judgment was affirmed. I refer to that judgment, of which I have a report now lying before me of the speech delivered by the late Lord Gifford; and it is important in point of authority, for it is a case not standing by itself; for when that case had been argued at the bar, and judgment was given, the noble and learned Lord took a review of the cases to which I have called your Lordships' attention; and the principle he extracted from those cases was the foundation of the judgment which he delivered. We are to consider, therefore, that those principles do not rest solely on the Courts in Scotland, but that they have passed under the review of this House, and have been approved and sanctioned by the House. Your Lordships extracted from them the principle on which the case of *Hill v. Hood's Trustees* was decided; and I advert to the case of *Hill v. Hood's Trustees* more particularly, because it was a material part of the foundation of the decision by the Court below in the case now before your Lordships. It was said at the bar, that the case of *Hill v. Hood's Trustees* did not apply to the present. To be sure the facts of that case are different from those of the present case, but the

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principle of the case was the same ; and when that case was cited by the learned judges in the Court below, and referred to as an authority, they did not refer to the facts of the case merely as governing the present case, but to the judgment of this House, to the principle upon which that was founded, and to the adoption of those authorities by the House, which had never before passed in review before your Lordships : the principle extracted from those authorities they considered as the foundation of the judgment of this House, and they applied that principle to the case now before you.

Before, however, I state the conclusion which I draw from these cases, it is necessary for me to advert to one case which was cited on the other side. I think only one case was relied on in argument, opposing the current of authorities to which I have called your Lordships' attention, and that was the case of *Dick v. Fergusson*. It is unnecessary for me to enter into the detail of that case of *Dick v. Fergusson*, because it was commented on in the judgment to which I have referred ; and after the facts of that case were commented upon before that noble and learned Lord, he was of opinion, and your Lordships' adopted that opinion, that the decision in that case did not run counter to the authorities in the cases to which I have adverted. Thus much, however, I will say respecting that case. In that case the trustees refused to accept the trust, or to act upon it ; and in a note by Lord Kames respecting that judgment, he puts the decision upon this ground :—He says it was competent to the trustees in that case to have disposed of the

*Hill v. Burns.*

property in favour of the heir-at-law. The effect of their not acting under the trust was to give the property to the heir at law,—they have, therefore, by so doing declared their intention that the heir at law should take it: and, considered in that view, it does not at all contravene the current of authorities to which I have called your attention. I am justified, therefore, in saying that the authorities are uniform upon this subject, and I am of opinion that they establish the position, that the trustees may dispose of this property among certain classes of persons, or among particular objects, subject to the intention expressed by the donor, the creator of the trust.

That being the general principle, another objection was made in this case as to the generality of the disposition. It was said, the property is to be given to such relations as the wife shall point out, with the approbation of the Trustees. It was then said at the bar, What is the meaning of the term relations? it is indefinite; and they even went so far as to say, in a certain sense, every man is the relation of every other man; but at all events the classes of the relations in the ascending and descending line are numerous and indefinite. The answer I make is this, that in the cases to which I have alluded that very point occurred; for instance, in that of *Murray v. Fleming*, the disposition was in favour of any of his blood relations she should think most fit to be nominated. Blood relations, therefore, would embrace all persons who were connected in blood with the disposer,—a body of persons as extensive as it was possible to conceive, and yet in that case the Court were of opinion that the disposition was

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good. In the next case to which I adverted, that of Brown and his relations, the disposition was to poor friends and relations, which the Court considered to embrace relatives both on the father's and on the mother's side;—the objection, therefore, was as open in that case as in the present, and yet the Court decided it in the manner I have mentioned. Again, in the case of *Snodgrass v. Buchanan*, the disposition was to the disponent's mother's relations, being again as extensive as it was possible for a disposition to be. The objects were relations. In none of these cases did the objection prevail; and it did not prevail because a particular individual was pointed out as the person who was to select among the class, and to point out those among the relations who were to take.

The same objection in point of principle will apply to those dispositions which were made in favour of charitable institutions, and in respect of those the same answer has been given. It is remarkable that, in the second case to which I have referred, the disposition was to the poorest friends and relations of the disponent, and that was considered a valid disposition: and in respect to charitable purposes, according to the law of England,\* which, as to bequests of this kind, is more strict than the law of Scotland, that would be a valid disposition.

For these reasons, after carefully attending to this case—after considering the most elaborate

\* *White v. White*, 7 Ves. 423. See *Atkyns v. Wright*, 17 Ves. 255. 1 Ves. and Beames, 313, and on Appeal in D. P. in 1824, MSS.

argument at the bar, from a gentleman who never omits, in the course of his address, any arguments which can be useful to his case,—I mean the Dean of Faculty,—looking to those authorities, and to what your Lordships did in the case of *Hill v. Hood's Trustees*, I must suggest to your Lordships the propriety of affirming the decision of the Court below in this case.

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Judgment affirmed.

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“village called Carmyle, situated on the said  
“bank of the said river?”

The issue came on for trial, under the direction of the Lord Commissioner of the Jury Court, and a verdict was found for the pursuers, establishing the right of way. An application was made for a new trial, on the ground of a misdirection in point of law. The argument for a new trial was carried on at considerable length, and the Court were finally of opinion, that there was no ground for a new trial. Afterwards a bill of exceptions, regularly signed, was tendered by the defender; and the question in point of law, with respect to the direction of the learned judge, came before the Court of Session, who, after hearing arguments, were of opinion, that the direction given by the Lord Commissioner at the trial was perfectly correct. It is from this judgment that the appeal has now been brought for your Lordships' decision. The whole case, therefore, arises upon the bill of exceptions; and I shall state very shortly, the effect of the evidence on the bill of exceptions, so far as it is necessary to point your attention to it, with reference to the direction of the learned judge who presided at the trial.

It appeared by the evidence of living witnesses who attended at the trial, that so far back as seventy years previously to the time of the trial, (I think as far back as the year 1755,) this way was used without interruption. There was no evidence whatever of any interruption of the right occurring until the year 1789, thirty-four years subsequent to the beginning of the period to which the evidence related. Not only was there

no evidence during that thirty-four years of any interruption of the right, but there was a distinct and positive evidence to the contrary. The exercise of the right of way had never, during that period, been at all interrupted; and there were various circumstances which were referred to in evidence, for the purpose of confirming that statement, and, among others, that in the fences there were regular stiles placed, in order to facilitate the passage of persons using the way. In the year 1789, for the first time, according to the evidence, this right was attempted to be interrupted. Even with regard to this interruption, there was contradictory evidence. It appeared however, by very clear and distinct evidence, that in the year 1797, an attempt had been made to interrupt the exercise of this right; and from the year 1797 down to the period of the trial, at successive periods, the occupiers of the property, over which the right of way extended, had at different times interrupted the exercise of it; but in no instance whatever, had these interruptions been finally successful. They had been always resisted; the fences which had been from time to time erected, had been pulled down; and the public had enjoyed the right of way, subject to these occasional interruptions, from the year 1755 down to the period of the trial. It appeared, therefore, that, except the interruption in the year 1789, even supposing that interruption to have been satisfactorily established, (with reference to which there was contradictory evidence,) there was no interruption existing at a period so far back as forty years previous to the time of the trial.

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Now these are all the facts, or rather the result of the facts, stated upon the bill of exceptions, necessary for the purpose of explaining the direction of the Lord Commissioner. His Lordship's direction was in these terms:—"If the jury believed the witnesses on the part of the pursuers, the public appeared to have been in the possession of, and in the habit of using such foot-path for a long period of time,—more than forty years, (that there is no doubt of;) and that there was on the part of the defender, no evidence to establish an interruption till within the forty years, (with respect to that fact also there was no doubt;) that in that case, and upon the whole evidence, the truth of which the jury was to weigh and consider, the question was, Whether the interruption, as to which evidence on the part of the defender had been adduced, was sufficient to defeat the right, as to which the evidence had been given on the part of the pursuers? And the Lord Chief Commissioner did then and there give as his direction to the jury in point of law, that the interruptions proved, were not sufficient to defeat a right in the public to the foot-way in question."

Now pausing here, the direction of the Lord Chief Commissioner appears to be perfectly correct, that is, assuming the right of foot-way to have been satisfactorily established by evidence. The interruptions which were proved, were not sufficient to defeat such right,—they were occasional interruptions, exercised during a period of about thirty-four or thirty-five years, but always resisted, and effectually resisted. Supposing, therefore, the right of way to have been estab-

lished, an attempt on the part of the occupiers of the land over which the way ran, from time to time to interrupt that right, but not effectually succeeding in interrupting that right, never can be considered as sufficient to get rid of a right of way once established. So far, therefore, there can be no doubt of the propriety of the direction of the Lord Commissioner. He then went on thus:—  
 “ Which right must, on the evidence for the pursuers, if believed by the jury, be presumed to have been established by having been used for forty years and upwards from the date of the interruption, as stated in the issue.”

Now with respect to that passage some doubt was entertained, and the principal part of the argument bore upon that part of the direction of the learned judge; but when it is considered with reference to the evidence, it appears to me to be perfectly distinct and intelligible. He tells the jury, that the right must, on the evidence for the pursuer, if that evidence be believed by the jury, be presumed to have been established by having been used for forty years and upwards from the date of the interruption, that is, previous to the date of the interruption in the manner stated in the issue; for in the issue, the attention of the jury is directed to the period of forty years' enjoyment, as being a period which is sufficient, if uninterrupted, to establish the right of way.

Now what is the evidence with respect to that part of the case? I shall assume, for the purpose of argument, that the interruption in 1789, was established to be an interruption without any contradictory evidence. I do not mean interruption that was finally successful, for the interruption

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was resisted; but for thirty-four years previous to that time, this way had been used without any interruption at all, by the acquiescence of the proprietors of the land, over which the way ran. That carries back the evidence as far as seventy years,—as far back as the memory of any witness could extend, who was examined upon the trial,—as far as it is probable the recollection of any witness could apply to a case of this description; and if thirty-four years of uninterrupted exercise of the right of way were established, it was then competent for the jury to presume, and they ought in point of law to be directed by the learned judge to presume, from thirty-four years' exercise of a right of way uninterrupted, a previous enjoyment corresponding with the manner in which it had been enjoyed during the thirty-four years. They therefore, were entitled from the evidence to presume, that for forty years previous to the year 1789, the date of the first interruption, this right of way had been exercised without any interruption; more particularly from those circumstances stated in the evidence, that there were actually openings made by the proprietors of the land, for the purpose of allowing the free use and enjoyment of that right of way. The case then stood thus:—The learned judge in substance told the jury, there is evidence, from which you may assume that for a particular period, namely for forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you in point

of law, that subsequent interruptions not acquiesced in, cannot defeat the right so acquired. It was contended, and contended strenuously, in argument by counsel at the bar, that, according to the law of Scotland, it was necessary to prove forty years' uninterrupted enjoyment down to the period of the trial. But it is quite impossible to maintain a position of that kind, for it would lead to this consequence, that if you were to establish an uninterrupted enjoyment, even for the period of sixty or seventy years, an occupier could at any time defeat that right so enjoyed, by successive obstructions, although those obstructions might be resisted by persons exercising the right of way, unless they thought proper to go into a Court of Justice. I apprehend that that cannot be the case. It cannot be the case certainly by the law of England. If the right be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in. There was no interruption here acquiesced in; and therefore the judgment given by the Court below, confirming the judgment of the Jury Court, sustaining the direction of the Lord Chief Commissioner upon the trial, ought to be affirmed.

In this case, as it appears to me that the direction of the judge to the jury was correct; and as there was an application made, in the first instance, for a new trial, on the ground of misdirection in point of law; and as that motion for a new trial was overruled; as the case was afterwards brought in upon a bill of exceptions, for the purpose of raising the same question; as the

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Court of Session was of opinion, that there was no ground for the bill of exceptions, and confirmed the direction of the learned judge; under such circumstances, this appeal ought to be dismissed with costs.

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Judgment affirmed.

# INDEX.

**ACCOUNTANT GENERAL.** *See* JURISDICTION.

**ADVOWSON.** *See* SIMONY.

**AGREEMENT.** *See* SPECIFIC PERFORMANCE.

**ASSETS:**

J. S., by a will properly executed, gave a sum of 4,000*l.* to be laid out in government or real securities, in trust for L., the wife of S., for her separate use for her life; remainder to J. for his life; remainder to the children of L. by S. He then devised certain lands and tenements specified to various persons named in the will, and after bequeathing several pecuniary legacies, he concluded thus:—"And I do hereby expressly charge and make liable my real and personal estate to, and with the payments of, the aforesaid legacies." Held, reversing the decree of the Court below, that the lands specifically devised were not liable to the payment of the legacies on a deficiency of the personal estate. *Spong v. Spong* - p. 84

**CHARGE.** *See* ASSETS.

**CLERK OF THE PEACE.** *See* CUSTOS ROTULORUM.

**CONSTRUCTION.** *See* ASSETS. DEVISE. SIMONY.

**CONTINGENCY.** *See* DEVISE.

**CUSTOS ROTULORUM.**

Upon a special verdict, the jury found that by an Act of Parliament in Ireland of the third and fourth of Philip and Mary, it was enacted that the King and Queen and her successors should be entitled to the Counties of Leix, Slievemarge, Irry, Glinmalire, and Offaly, and that for making them shire grounds, a certain portion of the said counties should henceforth be a shire or a county, by the name of the King's County, &c.: and that from the year 1556, (the date of the act,) the Kings and Queens of Ireland have nominated and appointed, and been used to nominate and appoint, fit persons to fill the office of Clerk of the Peace for the King's County to the year 1798, in which year it was found that the Defendants in error, were by patents created Clerks of the Peace within every county in the province of Leinster, except Kilkenny, to hold for their lives, &c., and that under the patent they held and exercised



the duties of the office till 1800; and that the King's County is in the province of Leinster: the verdict then found that the Custodes Rotulorum of the County have appointed persons to fill that office, in the said county, from the year 1760 to the present time, (1819,) who have held and enjoyed the said office accordingly, with the exception of, &c., who were in possession under the crown; and further set forth letters patent, dated in 1776, appointing the Earl of Drogheda Custos Rotulorum of the King's County during pleasure, and also certain deeds or warrants under seal, whereby the Earl of Drogheda appointed successively two Clerks of the Peace for the King's County, who executed the duties and received the emoluments of the office, without interruption, from 1772.

Held, reversing the judgment in the Court below, that the Custos Rotulorum, and not the King, has, by law, the right to appoint the Clerk of the Peace in the King's County.

*Harding v. Pollock* - - - - - p. 161

**DEED.** See EXCEPTIONS.

**DEVISE.** See ASSETS.

A testator, by his will, devised to trustees and their heirs, all his freehold and copyhold land at S., and also his freehold land at H., in case there should be but one son of his daughter A. who should attain the age of twenty-one years, upon trust for such son and his heirs; and in case there should be two or more sons of A. who should attain the age of twenty-one years, then in trust for the second of such sons and his heirs; and in case there should be no son of A., upon trust for such of the daughters of A., (if any) as should first attain the age of twenty-one years, &c.: and then after certain bequests of stock in trust, to pay the dividends by way of life annuities, the testator devised and bequeathed all the residue of his property, whether freehold, copyhold, or for years, money in the funds, upon mortgage, or otherwise, upon security, or at interest, and debts of whatever other nature or kind, to the same trustees, their heirs, executors, and administrators, upon trust to sell, get in, &c., and to apply the proceeds in payment of debts and legacies, &c., and as to the residue of the monies to arise by such sales, to invest the same in the public funds, or real securities; and if there should be only one child of A., upon trust to transfer or assure the funds, and the dividends, interest and annual proceeds thereof, to such only child at or on his attaining the age of twenty-one years, &c.; and if there should be two or three children of A., in trust for such two or three children, equally to be divided between them, the shares of sons to be transferred on their attaining the age of twenty-one years, &c. The testator afterwards made a codicil to his will in these words:—"Having some short time back drawn my pen

through the first fifteen lines of the sixth sheet of my will, and being apprehensive that such erasure not being witnessed, might lead to litigation, I declare that the sole intention of such rasure is, to revoke that part only of the will, whereby I direct the sale of my freehold property; and I hereby direct and appoint that the son of my daughter A., who shall first attain the age of twenty-one years, shall, on attaining that age, change his name to Elwes, and I give and devise to the said son of A., on his attaining the age of twenty-one years and changing his name to Elwes, all my freehold property, lands, tenements, and hereditaments, to hold to my said grandson, his heirs and assigns, &c.; and I do hereby ratify and confirm the said will, except as before is excepted.

Held, that the will was revoked by the codicil, expressly as to the power of sale; and as to the corpus of the lands at S. and H., by the effect of inconsistency of devise, but that the will was unrevoked and operative in all other respects; and that under the devise, by the effect of the will and codicil, no estate in the lands at S. and H. and the other freehold estates was vested, but remained contingent upon the event of sons or daughters of the testator's daughter, according to the limitations of the will, living to attain the age of twenty-one, &c.; and that until such vesting upon such event (or until such event should become impossible,) the estate in the lands, vested in the trustees, and the rents and profits were applicable, according to the trusts of the will.—

*Duffield v. Duffield* - - - - - p. 260

#### EXCEPTIONS, BILL OF:

By a deed in 1762, lands were conveyed to the use of the grantor for life, and after his death in trust for D. S. his daughter, the wife of R. S., and after her death to the first and other sons successively of D. S. by R. S., with remainders over and subject to a power of revocation. In 1763, the grantor, by a will made in execution of the power, directed and desired that if there should be no issue male of the existing marriage, the lands should stand limited (subject to the dispositions of the deed of 1762,) to the first and other sons of his daughter by any other husband.

R. S. died in 1778, leaving D. S. his widow, and four sons surviving. Soon after his death, D. S. married R. B. by whom she had a son A. B.

J. S. the eldest son of the first marriage, having been from his infancy a person of weak capacity, in the year 1785, as soon as he came of age, joined with his mother and father-in-law as party to a deed, by which, reciting his title as tenant in tail in remainder, subject to his mother's life interest in the lands,

and an agreement which had been made for providing thereout a present maintenance for him; and that the younger children of his mother had been left without provision by the deed of 1762; and further reciting certain expenditure made on the premises by R. B., the husband of his mother, for the benefit of the inheritance, the lands were assigned to trustees for a term of five hundred years, in trust to secure to J. S. an annuity of £., and subject thereto to the use of the mother for life; remainder to R. B. for his life; remainder to trustees for a term, to raise portions for the younger children of D. M. his mother, and subject thereto to the use of J. S. and the heirs male of his body, and in default of male issue, to such other of the children of D. M. as she should appoint, and in default of appointment, to R. S., E. S., and A. B., three of her children; remainder to her right heirs.

A fine and recovery were levied to give effect to this deed, which was registered in 1789.

J. S. died in 1794. In 1800, L. S., the second son of the first marriage, filed a bill in Chancery against R. B. and D. his wife, to establish the deed of 1762, and to set aside the deed of 1785, on the ground of fraud. This bill was dismissed by the Plaintiff in 1805.

By deed in 1803, D. the mother, appointed the lands to A. B. her youngest son, subject to the payment of annuities. In 1809, the lands were by deed executed on the marriage of A. B. settled on the husband and wife, and the issue of the marriage, notwithstanding notice given to the parties by L. S. of his claim.

R. B. died in 1813; A. B. died in 1814, leaving a son; D., the mother, died in 1818. Upon this event, L. S. brought an action of ejectment against the parties in possession under the deed of 1785. This ejectment was not prosecuted, but in 1821 (L. S. being dead,) an ejectment was brought against the same parties by his son. Upon the trial it was agreed between the parties that the sole question should be, whether the deed of 1785 was void at law as the deed of J. S. It was sworn upon the trial by some witnesses that J. S. was not competent at the time of making the deed, and they spoke to acts and conduct evidencing mental incapacity. On the other hand, it was by others sworn, that he was competent to execute. It was admitted that the incapacity did not arise from lunacy,—no evidence having been given of lunacy.

The judge on his charge to the jury told them, that the question for them to try was, whether J. S. was a person of sound mind or not, and that to constitute such unsoundness of mind as should avoid a deed at law, the person executing such a deed must be incapable of understanding and acting in the

ordinary affairs of life; that it was not necessary that he should be without any glimmering of reason, and that as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him. To this direction a bill of exceptions was taken, upon the ground that the judge refused to tell the jury, that in order to avoid the deed at law, the unsoundness of mind must amount to that which constitutes idiocy according to the strict legal definition of an idiot.

Held that this direction was right, and that the case could not be argued or decided upon an objection that the direction was too general and vague, because such objection was not taken at the trial, and did not form part of the bill of exceptions.—

*Ball v. Mannin* - - - - - p. 1

**FORGERY.** See JURISDICTION.

**IDIOCY.** See EXCEPTIONS.

**JUDGE (DIRECTION OF).** See EXCEPTIONS.

**JURISDICTION:**

By the stat. 23rd and 24th Geo. III. of the Parliament of Ireland, for securing the monies of suitors of the Courts of Chancery and Exchequer, by depositing the same in the National Bank, which provides for the appointment of an Accountant-general for the Court of Exchequer, it is enacted, that "So long as he observes the rules thereby, or by the Court to be prescribed, he shall not be answerable for any monies which he shall not actually receive, but that the Bank shall be answerable for all monies deposited with them;" and regulations for the transfer of stock are specified in the act.

Under this Act A. was appointed Accountant-general of the Court of Exchequer, in the year 1796.

In the year 1810, A. executed a power of attorney, authorizing S. B., his chief clerk, to make transfers in the Bank books of any stock of which A. should first have executed a transfer draft under his hand on check paper, pursuant to the orders of the Court. This power was deposited at the Transfer Office at the Bank. Under this power S. B., producing a certificate or transfer draft, purporting to be signed by A., but in fact forged, and in several respects not conformable to the particulars required by the power and the statutory regulations, obtained a transfer of stock from one cause to another, for the purpose of supplying deficiencies in the stock in the latter cause, which had been caused by transfers under certificates formerly forged by S. B. Upon the discovery of this transfer from the first to the second cause, two creditors in the first cause, who had proved their debts, made a motion in the cause, calling upon A. to refund the stock transferred; which, after

hearing affidavits of the Appellant and the Bank of Ireland, was ordered by the Court. Upon appeal against this order, it was questioned whether the Court of Exchequer had jurisdiction to make such order by a summary proceeding not in a cause; and whether the House of Lords had jurisdiction to entertain such appeal: but, eventually, the order was reversed—*O'Neill v. Fitzgerald* - - - p. 24

**LUNACY.** See EXCEPTIONS.

**NEXT PRESENTATION.** See SIMONY.

**NOTICE.** See SPECIFIC PERFORMANCE.

**PREROGATIVE.** See CLERK OF THE PEACE.

**REAL AND PERSONAL.** See ASSETS.

**SIMONY.**

By the stat. 31 Eliz. c. 6, s. 5, it is enacted that "If any person, &c. shall for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, or other assurance of, or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, that every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon shall be utterly void, frustrate, and of none effect in law."

In *quare impedit* it was found by special verdict, that B. the incumbent of a rectory was, on a certain day, afflicted with a mortal disease, of which he died at eleven o'clock at night, and at three o'clock in the afternoon of the same day, T. the patron of the living, and F., both knowing the condition of B., in pursuance of an agreement, executed a deed, by which, in consideration of 6000*l.*, T. granted to F. the advowson for a term of ninety-nine years, if F. should so long live, with a proviso that as soon as F., by vacancy or otherwise, should have made presentation to the rectory, he should re-assign to T. the residue of the term. It was found also by the verdict that this agreement and deed was a device to convey the next presentation, but that the deed was executed without the knowledge or privity of H. (the person afterwards presented by T., and rejected by the Ordinary,) and without any intention to present him.

Upon this finding, judgments having been given for the Defendant, in the Courts of Great Sessions Chester, and the King's Bench, they were reversed in the House of Lords upon writ of error, the House being of opinion that this sale of the next

presentation was not void under the statute.—*Fox v. Bishop of Chester* - - - - - p. 123

SOLICITOR AND CLIENT. *See* SPECIFIC PERFORMANCE.

**SPECIFIC PERFORMANCE:**

An agreement for a reversionary lease having been obtained by an attorney from the son of his employer, who was remainder-man in a settlement, under which his father, who had granted the existing lease, was tenant for life,—on a bill for specific performance, the Court refused, under the circumstances, to enforce the agreement.

F. C., under a settlement executed in 1716, was tenant for life of certain lands, with a power to lease for any term not exceeding thirty-one years; remainder to his first and other sons successively in tail male. In 1745, F. C. granted to S. O. who was then acting as his attorney, a lease of lands, comprising two hundred acres of good land, Irish plantation measure, for three lives or thirty-one years, whichever should last the longest. M. C. was the only son of F. C. In 1749, M. C. by a writing indorsed upon that part of the lease of 1745, which was in the possession of S. O., in consideration of 20*l.*, agreed to ratify that lease; and on the expiration of the term, to grant a renewal for a further term of lives; a blank being left in the agreement as to the number of lives. The agreement was not indorsed on the counterpart of the lease in the possession of F. C., and was not registered till June, 1760. In May, 1760, F. C. died, leaving M. C. surviving, who by deed in 1760, settled the lands in trust for himself for life; remainder to his two daughters, as tenants in common. The Respondent became entitled to one moiety of the lands, as the only son of one of the daughters; and at a sale under a decree in Chancery in 1814, purchased the other moiety. At the time of the sale, it was mentioned that the lands were sold subject to the lease of 1745. S. O. died in 1780, leaving S. L. O., who was the last surviving life in the lease of 1745, and held the lands under the lease till his death, which took place in 1817. The Appellants claimed as devisees of S. L. O. In 1820, the Appellants filed a bill in Chancery, stating the facts above mentioned, and praying a specific performance of the agreement to grant a renewal of the lease.

Held, that under the circumstances, the Appellants were not entitled to such relief.—*Blakeney v. Bagot* - - - p. 237

**STAT. 31 ELIZ. c. 6. § 5.** *See* **SIMONY.**

**VESTING.** *See* **DEVISE.**

**WILL.** *See* **DEVISE.**

**WORDS.** *See* **ASSETS. DEVISE. SIMONY.**

## INDEX TO APPENDIX.

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### AGREEMENT :

1. A. being a tenant in possession of a farm, which he held after the expiration of a lease, made a proposal by missive, to take a new lease, upon the conditions of an offer made by W. for another farm belonging to the same estate. W. had engaged to enter into a lease, which was to contain "all the regulations to be laid down for the estate." G. the owner of the estate, by letter, accepted the proposal of A., on the footing of the offer of W., and "the general conditions *laid down* by him for the whole estate;" and this letter of acceptance provided, that a lease should be executed as soon as the other leases of the estate could be got ready. Three years after this proposal and acceptance, a document entitled articles and conditions, was signed by G., and various other proposed tenants of the estate, but not by W. or A. By one of these conditions it was provided, that "all the fodder should be used upon the farm, and none sold or carried away at any time." This document concluded by providing that the leases on the estate were to be granted upon, and to refer to the conditions therein contained. A few days after the signature of this document, a draft tack with various blanks, but containing a reference to the articles and conditions, and an obligation to perform them, and a consent to the registration of them, was signed by the tenants, including W. but not A. He did however, two years afterwards, sign this draft tack, which was never extended, or otherwise executed.

Held, that the draft tack as signed by A. was a probative document, and not a new contract between the parties, but referable to the preceding agreement and conditions; and that the condition prohibiting the sale or removal of straw, &c. applied to the last year of the term, and the way-going crop. The draft tack not having been produced on the first hearing of the cause, held, that the Appellant was liable for all the costs consequent upon the non-production.—*Gordon v. Anderson*, - - - - - p. 351



## AGREEMENT:

2. The owners of a ship applied by letter to S. and G. shipwrights, to lengthen and repair the ship, requesting them "to furnish an estimate of the probable cost, and also to note the prices of timber, and the rate of wages." The letter contained this passage:—"The timber must be all English oak, and if you have a sufficient quantity on hand for the repair of the ship, besides her lengthening." S. and G. by letter, in answer, say, the expence of lengthening, on a rough calculation, will be 900*l.*; and as the vessel would require other repairs, it would be the best for both parties, to do the whole by day work. The letter then contains this passage:—"The captain will have it in his power to keep an exact account of the articles expended, and to turn off any workmen that does not please him. We have on hand an excellent assortment of English oak timber of a suitable size for the vessel." A note of prices was added, "wages per day, 3*s.* 4*d.*; common English oak timber per foot, 5*s.*" In a subsequent letter from the owners, announcing the dispatch of the ship, this postscript is added:—"As it is understood that nothing is to be put into the ship but English oak timber and Dantzic oak plank, to which you must bind yourselves by letter, &c." To this S. and G. answer thus:—"With respect to the materials we have a good stock of English timber and Dantzic plank, and little or no Hamburg; so that Captain Young will have it in his power to take what he likes best." In a subsequent letter, the agent of the owners says:—"I hope you will put on her the best of materials, and also the best of workmanship."

The repairs were superintended by the captain, the carpenter, the master, and a part owner of the ship, and were completed in 1807. While the repairs were going on, the wages of carpenters were increased by order of justices, 6*d.* a day.

Immediately after the completion of the repairs, the ship sprang a leak of an alarming description, on her return to port, when she was repaired by the owners, upon a notice given to the builders, who sent their foreman to inspect. After these repairs, the vessel was proceeding on a voyage to Davis Straits, but was obliged to put back on account of her leaky condition, and was detained twenty-two days on repairs, when the season being too late for the fishery in Davis Straits, she sailed on a fishing voyage to Greenland, and brought home a short cargo. These transactions took place in 1806 and 1807. In 1813, S. and G. brought an action for the amount of their bill. After various legal proceedings, upon inspection of the ship, it appeared that American oak had been used in the repairs of the ship; that two of the bolts had been driven and clenched imperfectly; that there was one hole without a tree-

nail; and that the vessel after the lengthening and repair, had increased in the midships five feet in width.

Held, under these pleadings and proofs, that the shipwrights had no right to charge in their account, the additional 6d. per day for wages, nor for the price of superior oak timber; that they were answerable in damages, for having used American instead of English oak, for the repairs done by the Respondents, and for the supposed loss in the fishing voyage, consequent upon the detention for repairs.

Held also, that the costs were properly given against the Appellants, although they had a judgment for a balance, after allowance of all the deductions for damages.—*Strachan v. Paton* - - - - - p. 359

**BIBLE** See PREROGATIVE.

**BYE-LAW.** See CORPORATION.

**CONSTRUCTION.** See AGREEMENT. DEED. PREROGATIVE. TESTAMENT.

**CONTRACT.** See AGREEMENT.

**CORPORATION:**

A trading corporation having by its bye laws fixed a rate of allowance to be made to the widows of deceased members, subject only to variation upon a defect of funds, cannot exercise a discretionary power as to the rate of allowance, but may be compelled by process in the ordinary Courts of Justice, (no defect of funds being alleged) to make the allowance fixed in a bye-law in favor of the widow of a freeman, who had entered after the date of the bye-law in question, and paid upon his entry a sum of money to the funds of the corporation, and made a small annual payment to the time of his death.

The costs incurred by an investigation of a disputed fact, not allowed to a party who had the judgment upon the general question of right, the fact being found against that party.—*Corporation of Fleshers v. Scotland* - - - p. 384

**COSTS.** See AGREEMENT, 1, 2. CORPORATION.

**DEED:**

G. by trust-deed, disposed lands at his death to trustees, to convey to his first and other sons in succession, and the heirs male of their bodies respectively, and in default of such issue, to the first son of either of his daughters who should first attain the age of twenty-one years and his heirs; but in case his daughters should both die, and have no such son of either of them, to convey to G. and R. his nephews. The residue of his real estate he gave to the same trustees to sell, for the use of his daughters; and he assigned and disposed to the same trustees, for the use of his heirs and substitutes,

&c. in the order in the deed mentioned, the charters, &c. and rents, "for now, and in all time coming."

Held, that the rents accruing between the death of the disponent, and the event on which the lands were to vest in a son of the daughter, belonged not to the daughters as heirs portioners, nor as disposed to them under the residuary clause of the deed, but were to be held in trust for the parties who should become entitled under the dispositions of the deed.—*Graham v. Templer* - - - - - p. 380

**DEED.** See **FRAUD.**

**EVIDENCE.** See **AGREEMENT.** **PRESCRIPTION.**

**FACILITY.** See **FRAUD.**

**FRAUD:**

J. M., a man eighty-three years old, being entitled under the provisions of a trust disposition and settlement, to the annual produce of a fund, during his life, estimated at the value of 6,000*l.* but subject to reduction, in the proportion of one-third, upon the event of a suit, executed a deed by which he renounced all his interest in the fund, and assigned it to his daughter and her husband, to whom the reversion belonged, in consideration of an annuity of 40*l.* a year, to be paid to him for life out of the fund, and his funeral expenses. In a suit instituted to reduce this deed, it was admitted that he was weak and infirm, and addicted to intoxication; and it appeared that the deed was drawn up by the agents of the daughter and her husband, and that no agent or other person was employed on the part of the father.

Under these circumstances, the deed was held void and reduced, and the judgment affirmed on appeal. — *M'Diarmid v. M'Diarmid* - - - - - p. 373

**HOMOLOGATION.** See **TESTAMENT.**

**INTERDICT.** See **PROPERTY.**

**LANDLORD AND TENANT.** See **AGREEMENT.**

**LEGACY.** See **TESTAMENT.**

**LETTERS PATENT.** See **PREROGATIVE.**

**LITERARY PROPERTY.** See **PREROGATIVE.**

**PREROGATIVE:**

The King by letters patent granted to B. and B. their heirs and assigns, to be his only printers in Scotland for forty-one years, to use and enjoy with all its profits and privileges, so far as the same were consistent with the articles of the Union, and especially the sole privilege of printing in Scotland, Bibles, (*Biblia Sacra*,) Testaments, the Psalms, the Book of Common Prayer, Confessions of Faith, and the greater and lesser Catechisms, in the English tongue. The letters prohibited all other persons, subjects and foreigners, to print in or import into Scotland from any parts beyond the seas, any

of the said books, without the licence or authority of B. and B., their heirs, assigns, and substitutes, under pain of confiscation.

Held, that the patentees had under this patent, the exclusive right of printing in Scotland, all the books enumerated in the patent, and that the received English translation of the Bible was within the terms of the patent, and could not be sold in Scotland without the authority of the patentees, although the prohibition, in terms, extended only to importation from parts beyond seas.—*Miller v. Blair.* p. 391

**PRESCRIPTION:**

Upon the trial of an issue directed to try whether for forty-six years prior to 1822, there existed a public foot road from G. to C. it was proved that from the year 1755 to 1789, the road was used by the public without interruption; and that stiles had in 1789 been placed in the fences by the owners of the land over which the road passed. From the year 1797 there were frequent interruptions down to the date of the trial. The judge at the trial, directed the jury that the interruptions proved were not sufficient to defeat the right in the public to the footway in question; which right must on the evidence be presumed to have been established, by having been used for forty years and upwards, from the date of the interruptions as stated in the issue. Upon a bill of exceptions to this direction, held, that on proof of thirty-four years uninterrupted exercise of the right, it was competent for the jury to presume, and that they ought in point of law to be directed to presume, a previous enjoyment corresponding with the manner in which the road had been enjoyed during the thirty-four years, establishing, according to the law of Scotland, a prescriptive right of way.—*Harvie v. Rogers* - - - p. 440

**PRESUMPTION.** See **PRESCRIPTION.**

**PROPERTY:**

A proprietor of land on the bank of a river, having commenced the building of a mound, which, according to the opinion and report of an engineer, would, if completed, in times of ordinary flood, throw the waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them, was restrained by perpetual interdict, from the farther erection of any bulwark, or other work, which might have the effect of diverting the stream of the river in time of flood from its accustomed course, and throwing the same upon the lands of the Appellant.—*Menzies v. Breadalbane* p. 414

**PUBLIC.** See **PRESCRIPTION.**

**RIVER.** See **PROPERTY.**

**RENTS.** See **DEED.**

**ROAD.** See **PRESCRIPTION.**

**SHIP.** See AGREEMENT 2.

**TACK.** See AGREEMENT 1.

**TESTAMENT:**

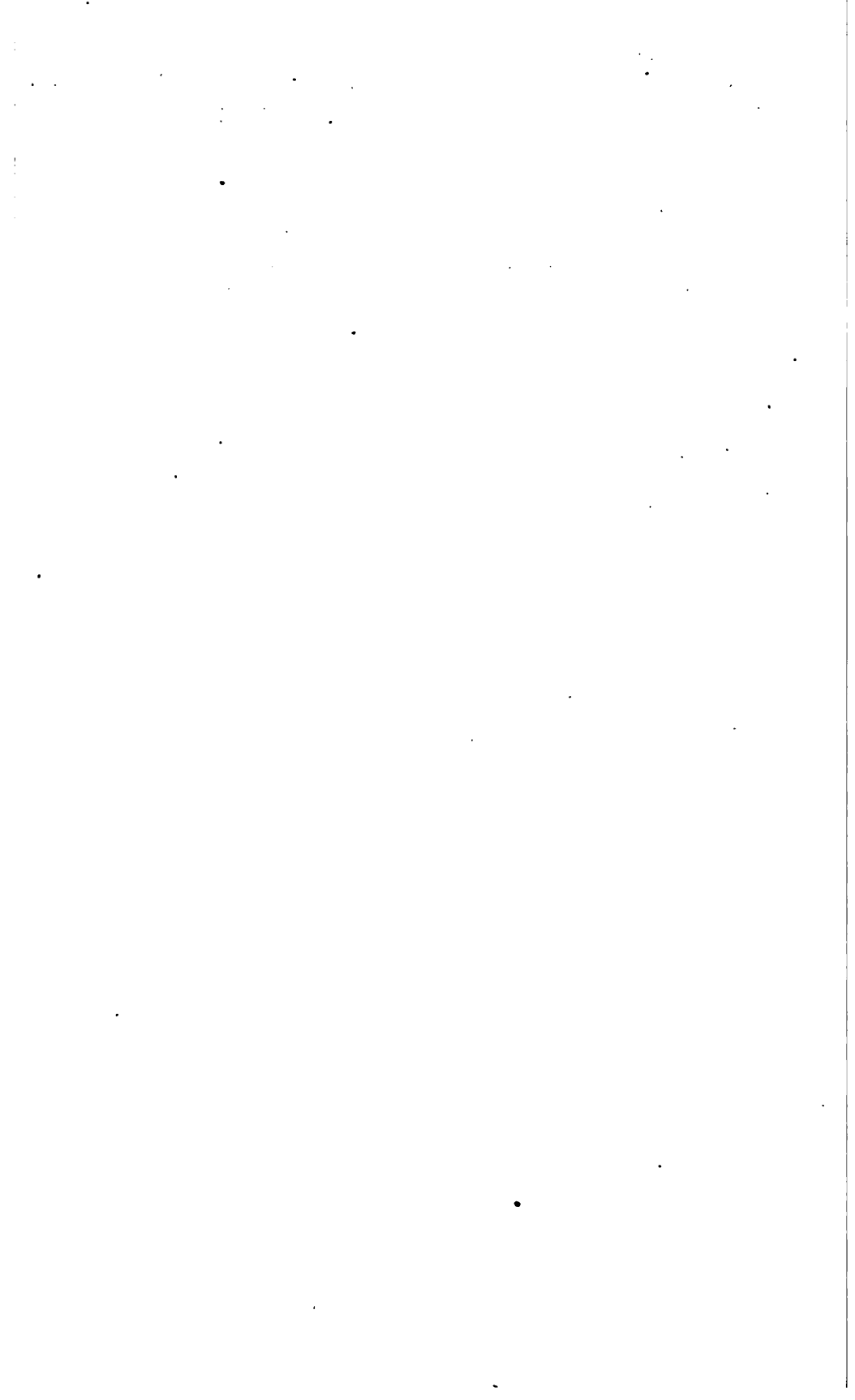
J. C. by deed of trust and settlement, gave all his lands, &c. to trustees, among whom was his brother, who accepted the trust, for the payment of debts, legacies, and other purposes, among which were donations to certain specified charities. The deed then contained this passage, "And in regard, I have not yet determined in what way and manner the further distribution of my means and estate shall take place, I hereby reserve to myself power and liberty to make such distribution at any time preceding my death, either in holograph instructions to my said trustees, to be executed informally, or by a formal deed, &c." In a codicil to this testamentary instrument, he made this declaration:—"In the event of my failing to make a distribution of my means and estate, which shall remain after fulfilling the purposes before specified, either by holograph instructions, though not formally executed, or by a formal deed of instructions, which I reserve to myself full power to do, then it is my wish, that such remaining means and estate, shall be applied in such charitable purposes, and in bequests to such of my friends and relations as may be pointed out by my said dearly beloved wife, with the approbation of a majority of my said trustees; and in the event of her decease, or entering into a second marriage, before such application shall have been pointed out and approved of as aforesaid, then I hereby empower the majority of the said remaining trustees, to make the application in the way and manner they would conceive to be most agreeable to my wishes if in life."

In a question between the brother claiming as next of kin, and the trustees—Held, 1. That the acceptance of the trust was not such an homologation of the deed, as to bar his title to sue. 2. That the testamentary instruments contained a valid disposition of the residue.—*Crichton v. Grierson* - p. 422

**TRUST.** See DEED. TESTAMENT.

**WAY, RIGHT OF.** See PRESCRIPTION.





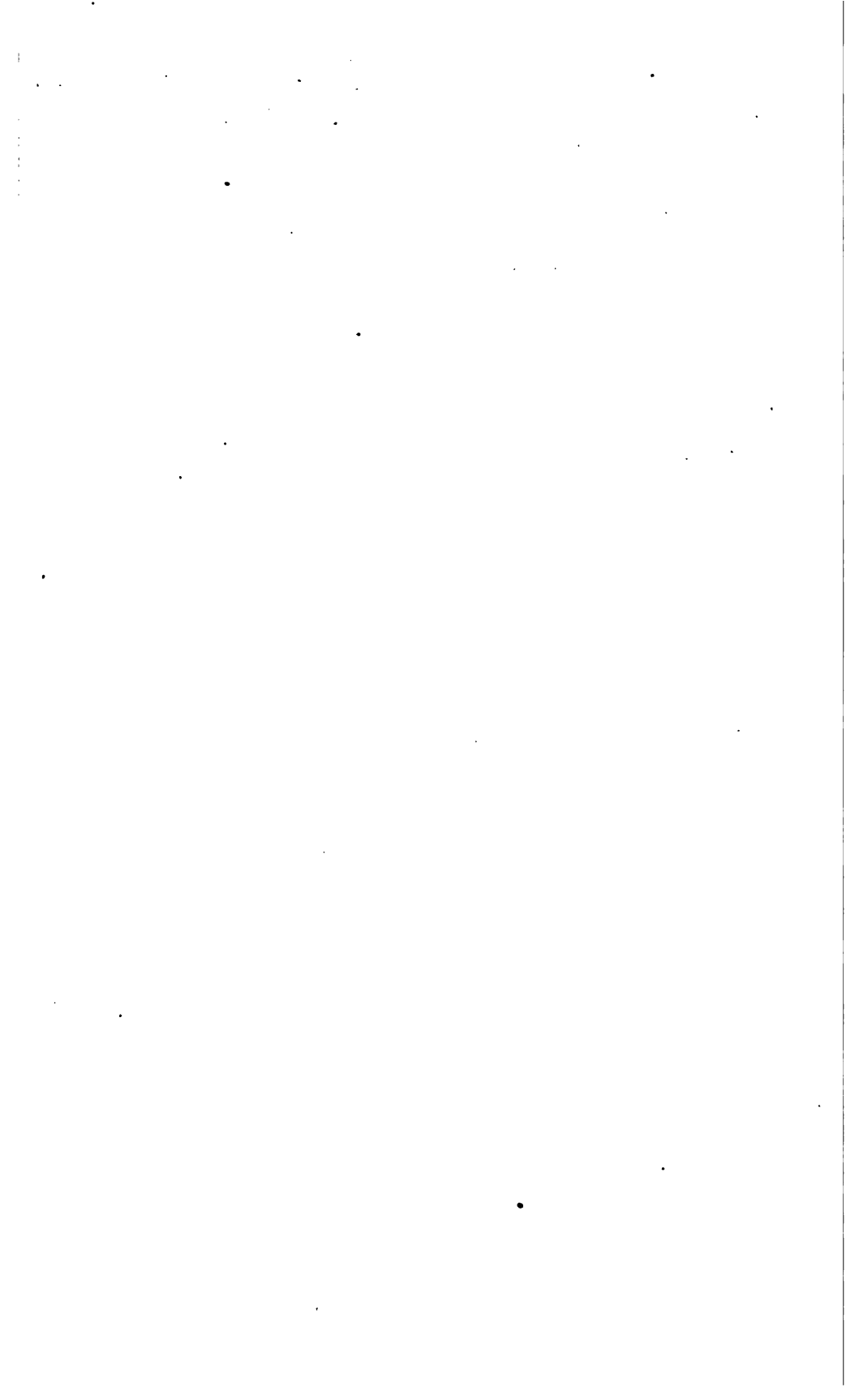
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